

Univerzita Karlova v Praze
Právnická fakulta

Šárka Ošřádalová

**Pomoc bez hranic? Humanitární asistence v rámci
mezinárodního humanitárního práva**

Diplomová práce

Vedoucí diplomové práce: doc. JUDr. PhDr. Veronika Bílková, E.MA., Ph.D.

Katedra mezinárodního práva

Datum vypracování práce: 23. 6. 2016

Charles University in Prague
Faculty of Law

Šárka Ošřádalová

**Help without Borders? Humanitarian Assistance under
International Humanitarian Law**

Master's Thesis

Thesis Supervisor: doc. JUDr. PhDr. Veronika Bílková, E.MA., Ph.D.

Department of Public International Law

Date of Submission: 23rd June 2016

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Šárka Ošťádalová

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Preface

First, I would like to express my deepest gratitude to the supervisor of this thesis *doc. Veronika Bilkova*. I am truly grateful to her not only for her kind and erudite help with this thesis, but especially for her mentoring, encouragement and support through all the time of my university studies.

I believe that without her my journey would be very different.

I would like to thank my family for allowing me to pursue my dreams and for believing in them together with me. I cannot imagine the world without you.

Finally, my endless gratitude and love will always belong to my friends for their support, hugs, strength and for being around even when the sun is not shining.

Prague, June 2016

Abbreviations

AP I	Additional Protocol I to the Geneva Conventions
AP II	Additional Protocol II to the Geneva Conventions
Art	Article
CUP	Cambridge University Press
IAC	International Armed Conflict
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
NIAC	Non-International Armed Conflict
OCHA	Office for the Coordination of Humanitarian Affairs
OECD	Organization for Economic Co-operation and Development
Para	Paragraph
Res	Resolution
UN	United Nations
UN GA	United Nations General Assembly
UN SC	United Nations Security Council

1. Introduction

It can be said that the history of wars and violent conflicts is probably as long as the history of the mankind itself. More than six thousand years ago; that is how far modern scientists are able to go back in our history to find physical evidence of two ancient cities, Hamoukar and Uruk, fighting against each other in a bloody war.¹ The face of the Earth went through significant changes since that time as the technical and economic development changed also the way we live and understand the world around us. Numerous civilizations perished and were born. Numerous inventions were discovered and numerous diseases disappeared. However, no matter the changes, war and armed conflicts have persevered. They are still present in nowadays word; affecting even more people than before due to the technological development and the way they impact the civilian population. According to the Database of Armed Conflicts, created by the International Institute for Strategic Studies, there are around 40 active armed conflicts being currently fought in the world.²

Armed conflicts, whether international or non-international, harshly influence the life of the civilian population living in the affected areas and generate a significant need for humanitarian assistance. The impact always depends on the particular armed conflict and local conditions, however, the most notorious problem is deprivation; especially when it comes to basic and essential supplies and services. The water reservoirs or pipes have been destroyed or damaged. Food or gas are precious goods as the ordinary business connections have been suspended and farming areas are covered by landmines. The electricity was shut off and there is not enough fuel for the generators. Medical supplies are a scarce commodity. The list could go on. It is not an exaggeration to say that in many cases the question of the access to humanitarian assistance is also the question of life, or death. Unfortunately, in recent years, humanitarian actors frequently struggled to provide assistance to civilians in need. The Syrian conflict, which began in 2011, has triggered

¹ First Blood – History's Earliest Recorded Military Conflicts. *Military History Now*. 13 October 2014 <<http://militaryhistorynow.com/2014/10/13/first-blood-historys-earliest-recorded-military-conflicts/>> accessed 20 June 2016.

² Armed Conflicts Database. *The International Institute for Strategic Studies*. <<https://acd.iiss.org/>> accessed 20 June 2016.

the world's largest humanitarian crisis since the World War II³ showing the international community that although there are rules governing humanitarian assistance during the time of armed conflicts, there are still thousands of civilians which are almost impossible to reach and provide with help. The rules are there, however, the reality shows that there is a problem, either with their application or with the compliance with them.

This thesis will focus on the issue of humanitarian assistance under international humanitarian law. There are two reasons which made me to choose this topic. The first one is outlined above: it is a very urgent and current topic influencing the lives of thousands of people. The second reason is more personal. The field of international law has been at the centre of my academic and personal attention for several years now. Almost since the very beginning of my master studies. I have always been interested especially in those issues concerning armed conflicts, use of force, and post-conflict situations. It took me few years to realize that, for me, there was a denominator common to all these areas. The aim to regulate force and violence and to bring at least some small pieces of humanity and stability into such situations which have the instability and jeopardy in their very nature. International humanitarian law has always been very interesting for me as it represents the effort to 'make war more human' while still respecting the inevitability of its cruel character. The rules created in order to regulate armed conflicts have to be realistic, otherwise they would not be respected at all. This applies also to the rules of humanitarian assistance. They have to be realistic to be truly respected by the parties to the conflict. For humanitarian assistance to take place, the rules which govern it need to take into account not only the interests of the civilians, but also the interests of the fighting parties. Without their cooperation, there would be no assistance delivered to those in need at all. I chose this topic in order to have the opportunity to explore these rules and their application more closely and also with the intention to answer some of my own inner questions regarding their realistic use in practice. Moreover, I would like to focus on the field of armed conflicts and humanitarian law also in my future as I wish to pursue an internship at the International Committee of the Red Cross.

³ ECHO Fact Sheet: Syria Crisis. *European Commission*. January 2015
<http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf> accessed 20 June 2016.

1.1 Research Questions and Aims of the Thesis

As was stated above, the core issue of this thesis is the concept of humanitarian assistance in current international humanitarian law. The thesis aims to research, describe, and analyse the legal framework of the concept of humanitarian assistance in current international humanitarian law, to evaluate its practical application to the complicated reality of modern armed conflicts, and, if necessary, to propose possible measures which could make it more suitable for the application in nowadays armed conflicts. To reach this aim, the thesis will aim to answer the following research questions:

- 1) How is the institute of humanitarian assistance in armed conflicts governed by current international humanitarian law? Which rules are created by the relevant treaty law and which have emerged through the customary law?
- 2) Is the current legal framework sufficiently developed for the use in modern armed conflicts and is it clear enough when it comes to its interpretation and practical application? Does it sufficiently reflect the transformation of armed conflicts during the last decades?
- 3) What are the weaknesses of the current legal framework? Which measures, if any, should be taken in order to make it more suitable for the application in the reality of nowadays armed conflicts?

1.2 Definition and Clarification of the Terms

As was stated above, the topic of this thesis is the issue of 'humanitarian assistance'. However, it is important to note that there is no general definition or understanding of this term which would be accepted by the whole international community and the doctrine.⁴ Different scholars, agencies, and international bodies use different terminology when it comes to the concept of 'humanitarian assistance' and to its

⁴ SANDVIK-NYLUND, Monika. *Caught in Conflicts*. Turku: Institute for Human Rights of Abo Akademi University, 1998, p 4-6.

definition.⁵ For example, the Geneva Conventions⁶ and their Protocols⁷ speak about ‘relief’ or ‘relief actions’⁸, while various United Nations documents use the term ‘humanitarian assistance’⁹. The concept is also frequently connected with a number of related terms such as ‘humanitarian aid’, ‘humanitarian relief’, and ‘relief assistance’ or ‘relief action’.¹⁰

Therefore, to maintain a clear understanding of the scope and focus of this thesis, it is necessary to establish a working definition of the term “humanitarian assistance” under which it will be used on the following pages. Given the fact that the definition is of a working character designed only for the purpose of this thesis, it is necessary to bear in mind its limitations as there are various ways through which the term can be approached.

1.2.1 Negative Definition of Humanitarian Assistance

To begin with, there are three different concepts which have to be excluded from the understanding of the term ‘humanitarian assistance’ for the purpose of this thesis. The first one is the concept of ‘development aid’ or ‘development assistance’. According to Sandvik-Nylund, the term ‘development aid’ is distinguished from the term ‘humanitarian assistance’ by the emergent character of the latter and also by its different objectives “...as humanitarian assistance primarily aims at ensuring the survival of victims’ of armed conflicts.”¹¹ Development aid is, on the other hand, more concerned with the long-term

⁵ Sandvik-Nylund (n 4) p 5-6.

⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

⁷ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 60.

⁸ Fourth Geneva Convention (n 6) Art 59, Protocol I (n 7) Art 18.

⁹ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations*. UN GA Res A/RES/46/182 19 December 1991.

¹⁰ SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance. In: HEINTZE, Hans-Joachim; Zwitter, Andrej (Eds.). *International Law and Humanitarian Assistance. A Crosscut Through Legal Issues Pertaining to Humanitarianism*. New York: Springer, 2011. p 7.

¹¹ Sandvik-Nylund (n 4) p 6.

perspective of the particular country or region in various sectors (e.g.: social, economic, political, health development, and overall welfare).¹² Also, as noted by Spieker, in contrast to development aid/assistance, humanitarian assistance is guided by humanitarian principles of impartiality, neutrality, and independence as enshrined in relevant legal norms of international humanitarian law ('IHL').¹³

The second concept, which needs to be distinguished and excluded, is the concept of 'disaster relief aid/assistance'. As was mentioned above, the aim of this thesis is to focus on the issue of humanitarian assistance only in the context of armed conflicts and under IHL. Thus, although some scholars understand the concept of humanitarian assistance also as "... [the] provision [of] goods and services essential for the survival of those being directly affected by man-made disasters... or natural disasters"¹⁴, the issue of humanitarian assistance as a relief provided to the victims of natural or man-made disasters which do not relate to armed conflicts will be excluded from this thesis.

Finally, the last concept to distinguish and put aside is the concept of 'humanitarian intervention'. Although there is a minority of authors who consider the two terms, humanitarian assistance and humanitarian intervention, to be very close or even synonymous¹⁵, they will be seen as strictly separated for the purpose of this thesis. As stressed by Sandvik-Nylund, the understanding of 'humanitarian intervention' in most cases "includes a coercive element in the form of threats or the use of force"¹⁶ and "the world "intervention" implies further that the action is undertaken without the consent of the state in which intervention is taking place."¹⁷ The world 'assistance' on the other hand

¹² Factbook 2010: Economic, Environmental and Social Statistics. Official Development Assistance. OECD. 2010 < <http://www.oecd-ilibrary.org/sites/factbook-2010-en/10/04/03/index.html?contentType=%2Fns%2FStatisticalPublication%2C%2Fns%2FChapter&itemId=%2Fcontent%2Fchapter%2Ffactbook-2010-82-en&mimeType=text%2Fhtml&containerItemId=%2Fcontent%2Fserial%2F18147364&accessItemIds=>> accessed 20 June 2016.

¹³ SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance (n 10) p 7. More attention to these principles and their significance in the context of humanitarian attention will be given in the further part of the thesis.

¹⁴ SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance (n 10) p 7.

¹⁵ WEISS, Thomas; MINEAR, Larry. Do International Ethics Matter? Humanitarian Politics in the Sudan. *Ethics and International Affairs*. 1991. Vol. 5 Issue 1. p 197 – 214. <<http://onlinelibrary.wiley.com/doi/10.1111/j.1747-7093.1991.tb00238.x/abstract>> accessed 20 June 2016

¹⁶ Sandvik-Nylund (n 4) p 6.

¹⁷ Ibid. p 6.

lacks this element of coercion and enforcement. Also, “*humanitarian assistance is to be guided by the principle of impartiality, neutrality, and non-discrimination and to be motivated by humanitarian needs first and foremost.*”¹⁸ Humanitarian assistance as a non-forcible concept is understood also, for example, by the Guiding Principles adopted by the United Nations General Assembly (‘the UN GA’) in 1991 which states that: “*The sovereignty, territorial integrity and national unity of States must be fully respected in accordance with the Charter of the United Nations. In this context, humanitarian assistance should be provided with the consent of the affected country and in principle on the basis of an appeal of the affected country.*”¹⁹ Thus, for the purpose of this thesis the term and concept of ‘humanitarian assistance’ will be perceived and used only as a non-forcible measure not violating the territorial and political sovereignty of the affected States.

1.2.2 Positive Definition of Humanitarian Assistance

Now, when it was clarified how the term ‘humanitarian assistance’ will not be understood and used for the purpose of this thesis, it is time to focus on the opposite issue. As was stated above, there are different definitions of humanitarian assistance. According to Spieker: “*The term humanitarian assistance, as used in the framework of armed conflict, addresses relief schemes provided to a civilian population – generally from outside.*”²⁰ Some scholars define it as “*an assistance of an exclusively humanitarian character, provided by the international community, to meet the immediate needs of victims of emergency situations*”²¹, while the World Health Organization considers it to be “[an a]id that seeks to save lives and alleviate suffering of crisis-affected population.”²² Some actors rather use the term ‘humanitarian aid’²³, while others speak about ‘relief actions’ or ‘relief schemes’ which is the terminology provided by the Geneva

¹⁸ Ibid. p 6.

¹⁹ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (n 9) para 3.

²⁰ SPIEKER, Heike. *The Right to Give and Receive Humanitarian Assistance* (n 10) p 8.

²¹ Sandvik-Nylund (n 4) p 6.

²² Glossary of Humanitarian Terms. *Relief Web Project*. August 2008.

<<http://www.who.int/hac/about/reliefweb-aug2008.pdf>> accessed 20 June 2016.

²³ http://ec.europa.eu/echo/what/humanitarian-aid_en

Conventions and its Additional Protocols.²⁴

As stated above, this thesis will mainly operate with the term ‘humanitarian assistance’. With respect to the scope and aim of this paper, it will be understood as meaning that kind of action or aid which has an exclusively humanitarian character, aims to meet the essential needs of the civilian population in armed conflict situations, and is provided by external or internal actors (e.g.: NGOs, international organizations, States). When used, the terms ‘humanitarian action’ or ‘relief action’ will be regarded as synonyms.

The reasons leading to this choice of elements are following. First, the definition will include only actions of an exclusively humanitarian character as the aim of this thesis is to focus on that kind of actions which bring relief to victims. The thesis is not intended to deal with that kind of actions which have a different primary motivation, e.g.: economic profit, military interests, or sustainable development.

Secondly, the definition will include only the actions with the goal to meet the basic needs of the civilian population in the situations of armed conflicts. The thesis does not have the ambition to address the challenging complexity of post-conflict aid and assistance. Thus, the aim of the thesis is to deal with the issue of meeting those kinds of needs which are essential for the survival of the civilian population affected by an armed conflict. In comparison, it can be presumed that the kind of aid aiming to meet the needs of the civilian population in a post-conflict situation would be far more complex and long-term; focusing not only on the absolute basics, but also on the stabilization of the situation and future development of the affected area.

Finally, the definition of the term will include that can kind of assistance which is provided by both external and internal actors.

²⁴ Fourth Geneva Convention (n 6) Art 59, Protocol I (n 7) Art 18.

1.3 Brief Outline of the Thesis

To deal with the questions raised above, attention will be given to the following issues.

First, the thesis will offer a brief outline of the development of the concept and meaning of humanitarian assistance throughout the history focusing primarily on the main milestones and their influence.

Secondly, the thesis will focus on the circumstances which trigger the need for humanitarian assistance.

Thirdly, the thesis will be concerned with the character of humanitarian assistance and with the principles of humanity, neutrality, and impartiality.

The subsequent part of the thesis will deal with the issue of consent and will discuss whether there is an obligation to grant a consent for a humanitarian assistance and from whom it should be sought.

Finally, the thesis will focus on the facilitation of humanitarian assistance and to its following aspects: the material scope, the facilitation of passage, the issue of control over humanitarian operations and consignments, the safety and freedom of movement of humanitarian personnel, and the obligations of third States.

The last part of the thesis will be dedicated to the conclusion.

1.4 Methods and Sources of the Research

Various research methods and sources will be used to gather and process the adequate amount of information necessary for the elaboration of the thesis. Regarding the methodology, the thesis will be mainly based on the analysis of various relevant sources and, when necessary, their comparison. With respect to the sources, attention will be primarily given to relevant international treaties (e.g.: Geneva Conventions and their

Additional Protocols) and their commentaries, writings of scholars in Czech, English or Spanish language, agreements concluded during previous armed conflicts (e.g.: Agreement on the Protection and Provision of Humanitarian Assistance in Sudan), useful national law and sources (e.g.: military manuals), documents adopted by the UN bodies (especially by the United Nations Security Council and by the United Nations General Assembly), documents of other relevant international organizations and bodies (e.g.: the North Atlantic Treaty Organization, the European Union, the ICRC, the Doctors Without Borders, etc.), and to other sources documenting previous practice and opinions of States and international actors.

2. Applicable Legal Framework

The main aim of this chapter is to examine the applicable legal framework of the concept of humanitarian assistance under IHL and to identify and briefly introduce its main legal sources. The chapter will be divided into two parts. The first one will focus on the applicable treaty law and the second one will be dedicated to the issue of relevant applicable customary law.

2.1 Applicable Treaty Law

Regarding the applicable treaty law, the most important general legal sources regarding humanitarian assistance are the Geneva Conventions²⁵ and their Additional Protocols²⁶; the Additional Protocol I ('the AP I') and the Additional Protocol II ('the AP II'); all of them being multilateral international treaties.

However, before proceeding to these legal instruments, a brief attention will be given also to The Hague Conventions of 1899²⁷ and 1907²⁸ as they were the first multilateral international treaties to contain rules concerning specifically the position and protection of civilians during the situation of war.²⁹ The last part of this sub-chapter will be dedicated to the Rome Statute of International Criminal Court due to its importance in the context of individual criminal responsibility for the violations of four types of international crimes: genocide, crimes against humanity, war crimes, and the crime of aggression.

²⁵ First Geneva Convention, Second Geneva Convention, Third Geneva Convention and Fourth Geneva Convention (n 6).

²⁶ Protocol I and Protocol II (n 7).

²⁷ *Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1889.

²⁸ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907.

²⁹ The Hague Convention 1899 and 1907 were adopted before the introduction of the term 'armed conflict' as it is understood by current international humanitarian law. Thus, they were in fact created to regulate 'wars' not 'armed conflicts'.

2.1. 1 The Hague Conventions of 1899 and 1907

The Hague Conventions of 1899 were adopted during the First Hague Peace Conference which was held on the initiative of the Russian tsar Nicholas II. The aim of the conference was to put a limit to the speeded-up armaments of all nations, create an effective procedure for the peaceful settlement of international disputes, and adopt measures and rules which would make war more humane. The conference resulted in the adoption of three conventions and three declarations and is considered to be one of the milestones in the history of IHL.³⁰

In the context of humanitarian assistance and protection of civilians, the most significant instrument adopted during the First Hague Peace Conference was The Hague Convention (II) with respect to the Laws and Customs of War on Land together with its annex, the Regulations concerning the Laws and Customs of War on Land ('the Regulations'). The convention and the regulations were revised and slightly altered at the Second Hague Peace Conference in 1907 which led to the adoption of the Convention respecting the Laws and Customs of War on Land (The Hague convention [IV] of 1907)³¹ which, with some minor changes, substituted The Hague Convention (II) of 1899.

The most relevant provision, concerning the purpose of this thesis, can be found in the annexes to the Conventions, in the Regulations. At this point, it is important to note that the Regulations did not contain any provisions dealing specifically with the issue of the provision of humanitarian assistance to the civilian population affected by a war. However, they addressed, although in a rather general way, the behaviour of the occupying power towards the civilian population under its control and the consequences of such an occupation for it. For example, the Art 43 of the Regulations stated that: "*The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible,*

³⁰ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo*. Praha: C.H. Beck, 2010, p 100.

³¹ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land* (n 27).

public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”³²

As mentioned above, the revised version of the Regulations was adopted in 1907. Thus, more than a century ago. There have been numerous international instruments, which deal with humanitarian assistance and the protection of civilians during armed conflicts more in detail, created since that time (e.g.: The Geneva Convention IV of 1949, the AP I or the AP II). Nevertheless, according to Ondřej, Šturma, Bílková and Jílek, some of the rules contained in the Regulations are still a part of the applicable international law as they became a part of international customary law.³³

2.1.1. 2 The Geneva Conventions and their Additional Protocols

As was stated above, the Geneva Conventions and the Additional Protocols do not define the term ‘humanitarian assistance’. Nevertheless, they contain a basic regulation of the obligations and rights of the parties to the conflict and also regulate the status and the role of the providers of humanitarian assistance in armed conflicts. It is important to note that given the fact that the Geneva Conventions and the Additional Protocols are primarily addressed to States, they do not directly confer rights or obligations upon humanitarian organizations.³⁴ Rather, they describe situations in which States have to allow the delivery of humanitarian assistance to civilians under their power or through the territory which is under their power as well as those forms of assistance which are entitled to the protection under IHL. They also provide the requirements and conditions which States are allowed to impose on the delivery of such assistance.³⁵

³² Ibid.

³³ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 101.

³⁴ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law*. London: Overseas Development Institute, 2010 p 7.

³⁵ Ibid. p 5-7.

2. 1. 2. 1 Legal Regime of Humanitarian Assistance in International Armed Conflicts

The legal regime of humanitarian assistance in international armed conflicts ('IACs') is, on the general level, governed by two key treaties: The Geneva Convention IV and the AP I. The Geneva Convention IV was adopted on 12th August 1949, entered into force on 21th October 1950 and there are currently 196 State parties to the treaty.³⁶ Given the extraordinarily high number of ratifications and its general acceptance by the States and other international actors, the Geneva Convention IV together with the Geneva Convention (I), the Geneva Convention (II) and the Geneva Convention (III) are considered not only to be universally ratified, but they are also perceived as the cornerstone of the contemporary IHL.³⁷ The position of the AP I is, however, more complicated. In April 2016 the AP I was ratified by 174 States. Although this still places the AP I among the most widely accepted legal instruments in the world³⁸, it cannot be considered as universally ratified as there is a number of States with strong military involvement in current armed conflicts or significant political power which have not ratified the AP I yet. For example: the USA, Pakistan, Iran, Somalia, Israel or Turkey.

The legal rules governing the humanitarian assistance in the context of IACs distinguish between humanitarian assistance provided within the occupied territories and in other territories. In the context of occupied territories, Art 55 and Art 56 of the Geneva Convention IV lay down the obligation of the occupying power to ensure food, medical supplies, medical and hospital establishments and services, and public health and hygiene to populations in occupied territories. Regarding the issue of humanitarian assistance, Art 59 of the Geneva Convention IV builds on Art 55 and Art 56 stating that: "*If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying*

³⁶Treaties, State Parties and Commentaries. *ICRC*.

<https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380> accessed 20 June 2016.

³⁷The Geneva Conventions of 1949: origins and current significance. *ICRC*.

<<https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm>> accessed 20 June 2016

³⁸ Ibid.

*Power shall agree to relief scheme on behalf of the said population, and shall facilitate them by all the means at its disposal.*³⁹ Moreover, according to Art 63 of the Geneva Convention IV, National Red Cross Societies or other relief societies shall be able to pursue their activities in accordance with the ICRC principles or under similar conditions and the Occupying Power may not require any change in the personnel or structure of these societies which would prejudice the aforesaid activities (relief schemes and operations).

Art 69 of the AP I widens the scope of essential supplies listed in Art 55 of the Geneva Convention IV and strengthen the provision by stating that: *“In addition to the duties specified in Art 55 of the Fourth Convention concerning food and medical supplies, the Occupying Power shall, to the fullest extent of the means available to it and without any adverse distinction, also ensure the provision of clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population of the occupied territory and objects necessary for religious worship.”*⁴⁰ Art 71 of the AP I, in relation to both occupied and non-occupied territories, specifies the position of the personnel participating in relief actions and the rights and obligations of the State party towards it.

There will be more attention given to the individual elements and issues of these provisions in the following chapters, nevertheless, it can be generally noted that *„there is a relatively wide space provided to humanitarian organizations, provided that they are impartial and operate in accordance with humanitarian principles [in the context of occupying territories].”*⁴¹

Regarding the situations of IACs and non-occupied territories, the Geneva Conventions were drafted and subsequently signed shortly after the end of the II World War, bearing in mind the horrifying consequences it had on the civilian population. Especially in the context of the ‘total war’ approach⁴² and the use of blockades and sieges.

³⁹ Geneva Convention (n 6).

⁴⁰ Additional Protocol I. (n 7).

⁴¹ Humanitarian Principles and Humanitarian Assistance. *GSDRC*. <<http://www.gsdr.org/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/humanitarian-principles-and-humanitarian-assistance/>> accessed 20 June 2016.

⁴² According to Encyclopaedia Britannica: ‘Total war [is a] military conflict in which the contenders are

For example, it is presumed that during the siege of Budapest, one of the bloodiest sieges during the World War II, approximately 38,000 civilians died from starvation and military action.⁴³ This was reflected also in Art 23 of the Geneva Convention IV which obliges State parties to allow the free passage of certain goods necessary for the survival of the civilian population. This obligation comprises consignments of medical and hospital stores as well as objects necessary for religious worship intended only for the civilian population other than its own, even if it is the civilian population of the adversary. However, essential foodstuff and clothes are only granted free passage once when they are intended for children under the age of fifteen, expectant mothers and maternity cases. Moreover, the obligation to grant free passage is subject to certain conditions. These will be examined in great detail later, nevertheless, as can be seen, the existence of numerous conditions and limitation of the free passage of foodstuff and clothes only to certain groups significantly weakened the strength of this otherwise very important provision.

The aim of the drafters of Art 70 of the AP I was to broaden the scope of Art 23 of the Geneva Conventions IV in regard to the character of relief consignments and their beneficiaries and to create more exact rules regarding the rights and duties of the State parties concerned in the particular humanitarian action. In comparison with the Geneva Convention IV, the AP I pays significantly more attention to humanitarian assistance and its provisions contain more details.

2. 1. 2. 2 Legal Regime of Humanitarian Assistance in Non-International Armed Conflicts

Regarding non-international armed conflicts ('NIACs'), it can be observed that the legal framework concerning this type of armed conflicts is generally less rich of provisions and details in comparison with the legal framework concerning international armed conflicts. This is, naturally, reflected also in the context of humanitarian assistance.

willing to make any sacrifice in lives and other resources to obtain a complete victory, as distinguished from limited war.' Total War. *Encyclopaedia Britannica*. <<http://www.britannica.com/topic/total-war>> accessed 20 June 2016.

⁴³ UGVARY, Krisztian; LUKACS, John; LOB, Ladislaus. *The Siege of Budapest: One Hundred Days in World War II*. p 25.

The situations of non-international armed conflicts are under IHL governed by Common Art 3 of the Geneva Conventions and by the AP II.

Art 3, which is common to all four Geneva Conventions⁴⁴, applies only to NIACs and it is, with regard to the Geneva Conventions, the only article applicable to NIACs. At least, as suggested by its second paragraph, until such time as a special agreement between the Parties will bring into force between them all or part of the other provisions of the Convention.⁴⁵ Given its special character, Common Art 3 was during its drafting called by some of the delegates a ‘Convention in miniature’.⁴⁶

Regarding the issue of humanitarian assistance, Common Art 3 does not contain specific provisions governing the obligations and duties of the parties to the conflict with regards to humanitarian actions as, for example, the provisions of the Geneva Convention IV does. Nevertheless, the second paragraph of the article deals with the so-called ‘right to humanitarian initiative’.⁴⁷ According to the second sentence of Common Art 3 para 2: “*An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.*” Thus, under this provision an impartial humanitarian organization is entitled to offer its services without this being seen as an unfriendly act or as an attempt to interfere in the internal affairs of concerned subject.⁴⁸ The Commentary to the Geneva Conventions highlights that for the offer to be legitimate and acceptable, it must come from an organization which is both ‘humanitarian’ and ‘impartial’ and the services offered and rendered must be ‘human’ and ‘impartial’ too.⁴⁹ However, there is no explicit provision provided by Common Art 3 which would oblige the concerned State to actually accept the offer, even when it satisfies the above-mentioned criteria, and which would provide details for its execution and realization.⁵⁰

⁴⁴ First Geneva Convention, Second Geneva Convention, Third Geneva Convention and Fourth Geneva Convention (n 6).

⁴⁵ Ibid. Art 3 para 2.

⁴⁶ Treaties, State Parties and Commentaries: Commentary of 1960. ICRC.

<<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=466097D7A301F8C4C12563CD00424E2B>> accessed 20 June 2016.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ CLAPHAM, Andrew; GAETA Paola and SASSÓLI, Marco. *The 1949 Conventions: A Commentary*. Oxford: OUP, 2015, p 498.

⁵⁰ Ibid; SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance (n 10) p 16.

Bearing this in mind, it should be noted that some scholars argue that obligations relating to humanitarian assistance could fall under Common Art 3 to some extent as they can be derived from the guarantees for human treatment, and the prohibition of violence against life and person or cruel treatment as given by para 1 of the article.⁵¹ According to these scholars there is a clear correlation between the prohibition of violence to life and cruel treatment and the obligation to provide civilian population with necessary basic supplies to prevent its starvation and suffering caused by internal armed conflict; for example, through humanitarian assistance when there are no other means. Supporting this argument, J. Baloro gives an example from the NIAC taking place in Sudan, where during one incident southern Sudanese rebel factions attacked a relief convoy destined for starving civilians. According to his opinion, such an attack was a clear violation of the principles of Common Art 3.⁵² Nevertheless, as pointed out by M. Torrelli who also supports the idea that Common Art 3 has indeed implication for humanitarian assistance, “*the exact scope of [Common Art 3] with respect to [humanitarian] assistance is all too often unknown.*”⁵³

Before the adoption of the AP II, the only provision applicable to NIACs was the above-mentioned Common Art 3 to the Geneva Conventions. This article, however, quickly proved to be inadequate. Especially in the view that approximately 80% of the victims of armed conflicts since the end of the World War II have been victims of NIACs.⁵⁴ Therefore, the AP II had been drafted with the aim to extend the essential rules of NIACs. In the fear of a possible weakening of their sovereignty, the States participating in the drafting and the adoption of the protocol decided to keep the text of the treaty short and simple. Instead of the 47 articles originally proposed, only 28 were adopted.⁵⁵

⁵¹ STOFFELS, Ruth. Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps. *International Review of the Red Cross*. September 2004. Vol. 86 No. 855 p 519-520.; BARBER, Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law. *International Review of the Red Cross*. June 2009. Vol. 91. No. 874 p 385.

⁵² BALORO, John. International Humanitarian Law and Situations of Internal Armed Conflicts in Africa. *African Journal of International and Comparative Law*. 1992. Vol. 4 p 462.

⁵³ TORELLI, Maurice. From Humanitarian Assistance to ‘Intervention on Humanitarian Grounds’? *International Review of the Red Cross* 1992. Vol. 32 Issue 288 p. 233.

⁵⁴ Treaties, State Parties and Commentaries: Additional Protocol II to the Geneva Conventions. ICRC. <<https://www.icrc.org/ihl.nsf/INTRO/475?OpenDocument>> accessed 20 June 2016.

⁵⁵ Ibid.

The AP II has not reached the universal ratification yet. So far there have been 168 ratifications by the State parties till April 2016.⁵⁶ That is even less than in the case of the AP I. Among the non-signatories are also major political or military powers. A number of them is involved or heavily interested in some of the currently ongoing armed conflicts, e.g.: the USA, Turkey, Iran, Israel or Pakistan. From the total 28 articles of the AP II, only one is dedicated to the issue of humanitarian assistance.

According to Art 18 of the AP II: “*Relief societies located in the territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict... If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned*”.⁵⁷ The first para of Art 18 contains the right to humanitarian initiative stated also in Common Art 3 of the Geneva Conventions. However, a significant difference between Common Art 3 and the AP II regarding humanitarian assistance is created by the para 2 of Art 18 of the AP II which sets more detailed conditions as when humanitarian action shall be taken, by whom, and under which circumstances. Although the provisions of Art 18 of the AP II do not go into such length as the relevant provisions of the AP I, they are still significantly more elaborated than the single paragraph dedicated to the issue in Common Art 3.

2.1.3 The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court⁵⁸ (‘the Rome Statute’) is the founding treaty of the International Criminal Court (‘ICC’). It was adopted at a diplomatic conference in Rome in July 1998 and entered into force on 1 July 2002 upon

⁵⁶ Ibid.

⁵⁷ Additional Protocol II (n 7).

⁵⁸ *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 U.N.T.S. 90.

ratification by 60 States.⁵⁹ As of 1 June 2016, the Rome Statute was ratified by 124 States.⁶⁰ The ICC is a permanent body and it has, under the conditions given by the Rome Statute, universal jurisdiction to prosecute criminals for international crimes; however, only for those listed in the Rome Statute. These can be divided into four groups: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.⁶¹

Regarding humanitarian assistance, the Rome Statute bears in mind both the protection of the humanitarian personnel and the protection of the civilians.

Focusing on humanitarian personnel, Art 8 (2)(b)(III), in the context of IACs, and Art 8(2)(d)(iii), in the context of NAICs, define as a war crime: “*Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict...*”⁶² Thus, to put in another way, once when they are under the protection given to civilians or civilian objects by IHL, it constitutes a war crime to intentionally and directly attack personnel, installations, material, units or vehicles involved in a humanitarian assistance. There is no difference in the subject matter for the situations of IACs and NIACs.

Regarding the protection of civilians in the context of humanitarian assistance, the most relevant subject-matter listed by the Rome Statute is the deliberate starvation of civilian population which is also classified as a war crime. To be more specific, according to Art 8(2)(b)(xxv), which is applicable only to IACs, “[i]ntentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva

⁵⁹ Database. Rome Statute of the International Criminal Court. *United Nations Treaty Collection*. <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-10&chapter=18&lang=en> accessed 20 June 2016.

⁶⁰ Ibid.

⁶¹ Ibid. Regarding the crime of aggression, the ICC is not able to prosecute individuals for this crime yet as according to the amendment adopted at the review conference in Kampala as there are two conditions which need to be met. First, the amendment has to enter into force for 30 State parties, and second, the Assembly of State parties has to vote in favour of allowing the ICC to exercise the jurisdiction over the crime of aggression.

⁶² *Rome Statute of the International Criminal Court (last amended 2010)* (n 57).

Conventions” constitutes a war crime. As can be seen, the last sentence of the provision directly addresses and criminalizes obstructions of humanitarian assistance as understood by the Geneva Conventions.

It is important to note that the Rome Statute does not contain any such provision directly addressing the issue of deliberate starvation during the situations of NIACs.

2. 2 Applicable Customary Law

Unlike in the case of the treaty law, it is more complicated to determine the existence of individual customary legal rules and to identify their exact content. The essential rule of the treaty law, regarding its binding power, is simple: Treaties apply to the States which have ratified them. The nature of the customary law is different.

The Statute of the ICJ describes international customary law as a “*general practice accepted as law*.”⁶³ It is generally accepted that the existence of a customary international law rule requires the presence of the following elements: “*state practice (usus) and a belief that such practice is required, prohibited or allowed, depending on the nature of the rule, as a matter of law (opinion juris sive necessitatis)*.”⁶⁴ As was stated by the ICJ in the *Continental Shelf Case*: “*It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and opinion juris of States*.”⁶⁵ Regarding the issue of state practice, according to Henckaerts, it must be looked at from two angles. First, what kind of practice actually contributes to the creation of customary international law (selection of state practice), and second, whether the selected practice establishes a rule of customary international law (assessment of state practice).⁶⁶ Considering the nature of behaviour, both physical (e.g.: battlefield behaviour) and verbal

⁶³ Statute of the International Court of Justice, Article 38(1)(b) In United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

⁶⁴ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts. *International Review of the Red Cross*. March 2005. Vol. 87 No. 857 p 178.

⁶⁵ International Court of Justice, *Continental Shelf case (Libyan Arab Jamahiriya v. Malta)*, Judgment, 3 June 1985, ICJ Reports 1985, pp. 29–30, § 27.

⁶⁶ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts (n 63) p 179.

acts (e.g.: military manuals, pleadings before international tribunals, diplomatic protests, national legislation, national case-law) of States constitute a state practice that contributes to the creation of a customary rule.⁶⁷ For a state practice to contribute to the creation of a rule of the international customary law, it needs to be sufficiently ‘dense’. As ruled by the ICJ in the *Continental Shelf Case*, to establish a rule of international customary law, the state practice has to be virtually uniform, extensive, and representative.⁶⁸ Nevertheless, it does not need to be universal. A general practice is sufficient.⁶⁹ This being said, there is no generally given or established number or percentage of States, which is required for a practice to be considered ‘general’. According to the ICJ, the decision should be based not only on the number of States, but also on their relevance as the practice should “include that of States whose interests are specially affected.”⁷⁰

With regard to opinion juris, there has to be a legal conviction that a particular practice is carried out as of right.⁷¹ Thus, States engaging in the practice have to be convinced that they act consistently with what they consider to be a legal obligation.⁷² Mere high frequency of the particular behaviour or its customary character is not sufficient.⁷³

A frequently discussed issue is the impact of treaty law on the creation of the customary law and also on the process of the determination of the existence of a particular customary rule. As stated by the ICRC: “Treaties are also relevant... because they help shed light on how states view certain rules of international rule.”⁷⁴ According to the ICJ’s judgement in the *Continental Shelf case*, “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in

⁶⁷ Ibid. p 179.

⁶⁸ International Court of Justice, *Continental Shelf case* n (64) § 74.

⁶⁹ Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, *International Law Association*, Report of the Sixty-Ninth Conference, London: 2000. Principle 14, p. 734.

⁷⁰ International Court of Justice, *Continental Shelf case* n (64) p. 43, § 74.

⁷¹ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts (n 63) p 181.

⁷² ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 130.

⁷³ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p. 130.

⁷⁴ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts (n 63) 183.

developing them.”⁷⁵ The degree of ratification and the number of ratification and accessions is undoubtedly relevant, nevertheless, it cannot constitute the only factor taken into consideration.⁷⁶

Regarding the issue of humanitarian assistance in the context of international humanitarian customary law and its connection with the relevant treaty law, it is generally accepted that the legal rules contained in the Geneva Conventions have their parallel counterparts also in the area of international customary law.⁷⁷ The character of the Additional Protocols is far more complicated and although some of the rules stated there are considered to be customary, that does not apply to all of them. Also, in numerous cases the customary status of a rule is disputed.⁷⁸

Given the uncertainty of the scope and the character of the contemporary international humanitarian customary law, the International Committee of the Red Cross (‘the ICRC’) decided to conduct a comprehensive study on the issue in 1995. According to the ICRC, the main purpose of the study was to “*determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules.*”⁷⁹ The preparations began in October 1997 and the final report was delivered in 2005 after eight years of research and expert consultations. Nowadays, when the issue of IHL is concerned, the ICRC Study on Customary International Humanitarian Law (‘the ICRC Study’)⁸⁰ is often quoted and used as a reliable and qualified source, especially due to its complexity, uniqueness, and also the position of the ICRC as generally respected and well-established player on the field of international law and international relations. Still, not all findings of the ICRC Study were fully accepted by all states and international actors and some parts of the conclusion were

⁷⁵ International Court of Justice, *Continental Shelf case* n (64) pp. 29–30, § 27.

⁷⁶ International Court of Justice, *Continental Shelf case* n (64) p. 42, § 73.

⁷⁷ More examined in Chapter 2.1.2.1 dedicated to the Geneva Conventions.

⁷⁸ Treaties, State Parties and Commentaries: Additional Protocol II to the Geneva Conventions (n 53).

⁷⁹ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts (n 63) p 177.

⁸⁰ Customary International Law. Database, *International Committee of the Red Cross*. <<https://www.icrc.org/customary-ihl/eng/docs/home>> accessed 20 June 2016.

criticised as too progressive and not reflecting the real state practice.⁸¹ Some states, for example the USA, also questioned the methodology of the ICRC study. Albeit the USA generally accepted the methodology as theoretically introduced by the ICRC, they criticized the ICRC for not following it during the actual research and for putting too much emphasis on irrelevant or legally insufficient sources.⁸²

There are four rules in the ICRC Study directly linked with humanitarian assistance: Rule 31, Rule 53, Rule 55 and Rule 56.

Rule 31 is dedicated to the protection of humanitarian relief personnel as it states that: “*Humanitarian relief personnel must be respected and protected.*”⁸³ According to the ICRC Study, rich state practice establishes this rule as a norm of customary international law in both IACs and NIACs. It also recalls that “[t]he safety and security of humanitarian relief personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation.”⁸⁴

Rule 55 focuses on the access to humanitarian relief for civilians in need stating that: “*The parties to the conflict must allow free and facilitate free rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.*”⁸⁵ According to the ICRC Study, state practice establishes this rule as a norm of customary international law applicable in both IACs and NIACs.⁸⁶ The rule is complex as it contains numerous obligations and rights. To begin with, it states that humanitarian relief, intended for civilians in need, has to be impartial in character and conducted without any adverse distinction. Also, the parties to the conflict are obliged to allow and facilitate ‘passage’ of such humanitarian relief and this passage has to be rapid and unimpeded. Finally, the rule

⁸¹ BELLINGER, John; HAYNES, William. A US Government Response to the International Committee of the Red Cross Study *International Humanitarian Law*. *International Review of the Red Cross*. June 2007. Vol. 89 No. 866.

⁸² Ibid. p 2-8.

⁸³ Customary International Law. Database. Rule 31. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule31> accessed 20 June 2016.

⁸⁴ Ibid.

⁸⁵ Customary International Law. Database. Rule 55. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule55> accessed 20 June 2016>.

⁸⁶ Ibid.

declares the right of the parties to the conflict to control the above-mentioned passage of humanitarian relief.

Rule 56 is concerned with the free movement of humanitarian relief personnel: *“The parties to the conflict must ensure the freedom of movement of authorized humanitarian relief personnel essential to the exercise of their functions. Only in case of imperative military necessity may their movements be temporarily restricted.”*⁸⁷ As in the case of the Rule 55, according to the ICRC Study, the Rule 56 has been established by the state practice as a norm of customary international law. To highlight the main parts, the rule contains the obligation of the parties to the conflict to ensure the of freedom of movement of humanitarian relief personnel. However, it also states that these personnel have to be authorized and their freedom of movement limits to the scope essential to the exercise of their functions. More importantly, the rule grants an exception to the above-mentioned as it declares that the movement of humanitarian relief personnel can be restricted, but only in the case of imperative military necessity and for a limited time. The ICRC also notes that *“the obligation to ensure freedom of movement is a corollary to the obligation to provide access to civilians in need and the prohibition of deliberately impeding the delivery of humanitarian assistance (Rule 55).”*⁸⁸

Rule 53 contains the prohibition of starvation of civilians as a method of warfare stating that: *“The use of starvation of the civilian population as a method of warfare is prohibited.”*⁸⁹ Rule 54 is also considered by the ICRC Study to be a norm of customary international law for both the situations of IACs and NIACs. The rule prohibits the starvation of civilian population as a method of warfare without any exception. The ICRC Study also states that: *“Rules 54-56 are a corollary to the prohibition of starvation of civilians as a method of warfare”* This means, according to the ICRC Study, that *“denying access of humanitarian aid intended for civilians in need, including deliberately impeding humanitarian aid (see Rule 55) or restricting the freedom of movement of humanitarian*

⁸⁷ Customary International Law. Database. Rule 56. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule56> accessed 2016.

⁸⁸ Ibid.

⁸⁹ Customary International Law. Database. Rule 53. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule53> accessed 20 June 2016.

relief personnel (see Rule 56) may constitute violations of the prohibition of starvation.”⁹⁰

At this point, it should be noted that this thesis will still use the ICRC Study as one of the main sources when discussing or elaborating related issues. However, it is necessary to highlight that given the above-mentioned criticism, the thesis will strongly aim not to use the ICRC Study as the only source when dealing with the issues of international customary law and will put emphasis also on introducing other relevant sources.

⁹⁰ Ibid.

3. Brief History of Humanitarian Assistance

Although the contemporary concept of humanitarian assistance has its roots in the modern era, the actual acts of providing material or medical assistance to people in need in the times of armed conflicts⁹¹ can be traced through hundreds of years of history across the whole globe. According to Davey, Borton and Folley, there were two main, albeit not exclusive and mutually connected, influences behind these ‘acts of humanity’: religious belief and the articulation of the laws of war.⁹² The world of ancient and medieval wars was not completely without rules and these rules had, very often, a religious origin. According to Leslie Green, “*since the earliest time there has been recognition that humanity and the future survival of society demand that limitations be placed upon the means and methods of warfare.*”⁹³ Thus, various religious believes and ethnical or moral codes derived from them significantly influenced the way civilians and their essential needs were approached during wars. The Christian idea of charity, the Islamic tradition of zakat⁹⁴, the ‘codes of honour’ established in ancient China or by Japanese samurais, and the ‘laws of chivalry’ created in the medieval Europe⁹⁵ are only some of the best known examples. Therefore, even in the pre-modern times there were calls for compassion and help for those civilians affected by wars and conflicts on one side as well as for rules and limitations governing the conduct of fighting forces on the battlefield on the other side. However, these rules were not universal and static. They varied depending on culture and time epoch. What is more, they were not always of a legal nature and frequently depended on the will and attitude of the leaders of the fighting forces. Similarly, they were not as comprehensive as those established by modern IHL and did not apply to all civilians indiscriminately. Also, people belonging to foreign cultures or believing in

⁹¹ In this particular sentence the term ‘armed conflicts’ is meant to be understood in its everyday usual linguistic meaning, not in the legal one.

⁹² DAVEY, Eleanor; BORTON, John; FOLLEY, Matthew. A History of the Humanitarian System. *Humanitarian Policy Group*. <<http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8439.pdf>> accessed 20 June 2016.

⁹³ GREEN, Leslie. What is – Why is there – the Law of War In SCHMITT, Michael and GREEN, Leslie (eds.). *The Law of Armed Conflicts: Into the New Millennium*. Newport: Naval War College, 1998 p 175.

⁹⁴ The tradition of zakat creates the so-called third pillar of Islam. Paying zakat is meant to remind Muslims to be appreciative of the blessings that Allah has bestowed upon them, and to help empower those who have less. What is Zakat. *Islamic Relief USA*. <<http://irusa.org/zakat/>> accessed 20 June 2016.

⁹⁵ GREEN, Leslie. What is – Why is there – the Law of War (n 92) p 150; IGNATIEFF, Michael. *Warrior's Honour: Ethic War and the Modern Conscience*. NYC: Henry Holt and Co., 1997 p 110.

different religion were commonly labelled as ‘barbarians’ or ‘infidels’ and treated in a significantly less favourable manner.⁹⁶

The advance of ‘humanitarian’ sentiment through the history was, therefore, generally slow and limited. At least till the 18th century, the time of J. J. Rousseau and E. de Vattel, to which the beginning of the rise of a new philosophical discourse, secular humanitarianism, can be traced.⁹⁷ This movement played an important role especially during the 19th century when it led to the creation of various humanitarian initiatives and development of so-called humanitarian principles⁹⁸. According to Davey, Borton and Folley, there was a series of factors which contributed to this flourishing of humanitarian initiatives and a new way of thinking at that time. First, the technologies invented by the industrialising nations increased the human cost of the conflicts. Secondly, improvements in transport and communication technology made the world a smaller and more connected place.⁹⁹ Also as noted by D. Forsythe: “*Armed conflict was becoming less and less chivalrous jousting contest for the few, and more and more a mass slaughter.*”¹⁰⁰

It was one of the bloodiest battles of the 19th century, the Battle of Solferino (1859), which gave the impulse for the foundation of an organization which is nowadays known as the ICRC and which has played a fundamental part in the creation and also the application of the modern concept of humanitarian assistance. The ICRC, originally ‘The Committee of Five’, was founded in 1863 at the suggestion of Henry Dunant. Dunant was a Swiss businessman who, as a witness of the Battle of Solferino, made his mission to call for the development of international treaties to guarantee the neutrality and protection of those wounded on the battlefield as well as medics and field hospitals. He also strongly advocated for the creation of national and international relief societies.¹⁰¹ In 1864,

⁹⁶ Ibid. IGNATIEFF, Michael. *Warrior's Honour: Ethic War and the Modern Conscience* p. 110.

⁹⁷ MACALLISTER-SMITH, Peter. *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organizations*. Leiden: Martinus Nijhoff Publishers, 1985 p 9.

⁹⁸ DAVEY, Eleanor; BORTON, John; FOLLEY, Matthew. *A History of the Humanitarian System. Humanitarian Policy Group* (n 91) p 5.

⁹⁹ Ibid.

¹⁰⁰ FORSYTHE, David. *The Humanitarians. The International Committee of the Red Cross*. Cambridge: CUP, 2005 p 16.

¹⁰¹ History of the ICRC. ICRC. 29 October 2010 <<https://www.icrc.org/eng/who-we-are/history/overview-section-history-icrc.htm>> accessed 20 June 2010.

following Dunant's persuasion, the Swiss Government organized a diplomatic conference where the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted.¹⁰² The treaty, which was the first multilateral convention with the purpose of affirming IHL, was originally signed by 16 States.¹⁰³ It was ratified by 57 States until its replacement by the Geneva Conventions of 1906.¹⁰⁴ The convention obliged the state parties to care for wounded soldiers, no matter the side they fought for, and introduced the red cross on a white background as a unified emblem for the medical services.¹⁰⁵ It accorded neutrality to ambulances and their personnel, protected humanitarian actions of civilians assisting the wounded, and granted the Red Cross a formal mandate to provide neutral and impartial assistance to civilian and military victims of conflict under the organization of national Red Cross Committees.¹⁰⁶

It is important to note that the early conventions applicable in the situations of war¹⁰⁷ did not put a great emphasis on the well-being of the civilian population and included only isolated provisions relating to them.¹⁰⁸ As noted by McAllister-Smith: "*In theory, civilians were not involved in direct hostilities, a general principle of the law of war being that military operations were confined to armed forces. Specific safeguards for the civilian population were therefore usually thought to be superfluous.*"¹⁰⁹ However, as the I World War showed such premises were wrong and outdated. The I World War had far reaching consequences for civilian populations as it claimed millions of civilian victims who died due to malnutrition and famine, epidemics, unbearable conditions of forced labour, aerial bombing, and atrocities committed by the fighting forces.¹¹⁰ After

¹⁰² *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (First Geneva Convention)* 22 August 1864.

¹⁰³ Treaties, State Parties and Commentaries: First Geneva Convention of 1864. ICRC.

<<https://www.icrc.org/ihl/INTRO/120?OpenDocument>> accessed 20 June 2016.

¹⁰⁴ The Convention of 1864 was replaced by the Geneva Conventions of 1906, 1929 and 1949 on the same subject. However, it ceased to have effect only in 1966 when the last state party to it which had not yet acceded to a later Convention (Republic of Korea) acceded to the Conventions of 1949. Ibid.

¹⁰⁵ History of the ICRC. *ICRC* (n 100)

¹⁰⁶ Discover the ICRC. *ICRC*. 1 October 2015.

<<http://www.icrc.org/eng/resources/documents/publication/p0790.htm>> accessed 20 June 2016.

¹⁰⁷ The first conventions had been using the term 'war' as the term 'armed conflict' was, in its contemporary legal meaning, introduced for the first time after the II World War by the 1949 Geneva Conventions.

¹⁰⁸ MACALLISTER-SMITH, Peter. *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organizations* (n 96) p 10.

¹⁰⁹ Ibid.

¹¹⁰ The 'German Atrocities' of 1914. *The British Library*. <<http://www.bl.uk/world-war->

the I World War, third Geneva Convention relative to the Treatment of Prisoners of War was drafted and adopted.¹¹¹ The ICRC also prepared a preliminary draft of a new convention for the protection of civilians including the rights to relief supplies and correspondence. Although the final version, so-called Tokyo Draft, was approved at the 1934 International Conference of the Red Cross in Tokyo, its submission before a diplomatic conference was stopped by the outbreak of the World War II.¹¹² After the war, the draft was reviewed and formed the basis for the Geneva Convention IV which was adopted in 1949.

During the both world wars, the civilian populations often struggled to cover their basic needs, especially those relating to food and medical supplies. The applicable legal rules of IHL at that time did not prohibit states to use starvation of civilian population as a mean of war as well as it did not oblige them to accept offered humanitarian assistance to ensure that the essential needs of the civilian population are covered.¹¹³ Starvation of the civilian population as a method of warfare had not been prohibited by the treaty law until the adoption of the AP I in 1977. Regarding the customary law, the existence of such a rule prior to 1977 is highly debatable and it was, according to Spieker, most unlikely, at least till the end of the II World War.¹¹⁴ Netherlands, Greece, Japan; these are examples of some of the countries which were during the II World War affected by deliberate starvation.¹¹⁵ Although there were some provisions concerning the protection of civilian population against the consequences of war and their protection in occupied territories contained in the Regulations concerning the Laws and Customs of War on Land, annexed to The Hague Conventions of 1899 and 1907, these were not sufficient. The Geneva Convention IV adopted in 1949 was the first multilateral treaty focusing exclusively on

one/articles/civilian-atrocities-german-1914> accessed 20 June 2016.

¹¹¹ Treaties, State Parties and Commentaries: Convention relative to the Treatment of Prisoners of War of 1929. ICRC. < <https://www.icrc.org/ihl/INTRO/305?OpenDocument> > accessed 20 June 2016.

The 1929 Convention relative to the Treatment of Prisoners of War was replaced by the third Geneva Convention of 12 August 1949 (Geneva Convention III). It is no longer in operation following the universal acceptance of the Geneva Conventions of 1949.

¹¹² MACALLISTER-SMITH, Peter. *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organizations* (n 96) p 12.

¹¹³ HULL, Isabel. *A Scrap of Paper*. Cornell: Cornell University Press, 2014; SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance (n 10).

¹¹⁴ Ibid. SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance.

¹¹⁵ COLLINGHAM, Elizabeth. *The Taste of War: World War II and the Battle for Food*. London: Allen Lane, 2011.

the status and protection of civilians during the time of armed conflicts. As was discussed in the previous chapter, the Geneva Convention IV was further supplemented by the AP I.

4. Triggers of Humanitarian Assistance

There are several preliminary conditions which have to be fulfilled for IHL rules relating to humanitarian assistance to be ‘activated’. In other words, states are not obliged to allow the provision of humanitarian assistance under every circumstance. The system of IHL including the specific rules governing humanitarian assistance lays down specific requirements establishing to what kind of situations these rules apply.

To briefly outline: First, there has to be a situation of an armed conflict. Secondly, the affected state, or an armed group controlling the particular territory, has to be in a situation when it is unable to fulfil the needs of the civilian population by its own means, and thirdly, the civilian population has to be in a need of the humanitarian assistance. Subsequently, regarding the actual execution of the humanitarian assistance, the assistance has to fulfil certain requirements relating to its character and it needs to be approved by the State (or States) concerned. This chapter will focus on the first three issues. Chapter V. will deal with the character of humanitarian assistance and Chapter VI. will be dedicated to the question of consent.

4. 1 Applicability of International Humanitarian Law

The concept of humanitarian assistance as understood by this thesis is governed by the rules of IHL. Thus, the situation has to fall within the ‘*ratione materie*’ of IHL for the relevant legal rules relating to humanitarian assistance to be applied. To put it another way, if IHL does not apply to a certain situation then, naturally, neither its legal rules covering the issue of humanitarian assistance. The ‘*ratione materie*’ of IHL is tightly tied to the situations of armed conflicts as the vast majority of its legal norms is applicable exclusively during the times of armed conflicts.¹¹⁶ Only a minority of the legal norms of the contemporary IHL is applicable also during the time of peace; these being, for example, the obligation to disseminate the knowledge of IHL or the obligation to de-mine

¹¹⁶ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 38.

the affected areas after the end of an armed conflict.¹¹⁷ The legal norms related to the issue of humanitarian assistance under IHL fall within those applicable only during the time of armed conflict. Therefore, there has to be a situation of an armed conflict for them to be applicable.

The history of the legal term ‘armed conflict’ is a rather interesting one. For centuries, both lawyers and the general public were using the term ‘war’ when describing violent fights and encounters among adversaries. Similarly, the legal norms governing these wars created together the so-called ‘law of war’. However, from the legal point of view the term ‘war’ was problematic as it applied only to armed encounters of high intensity among states.¹¹⁸ Moreover, some of the legal instruments governing the laws of war were applicable only to declared wars. When combined together with the vague of some of the commonly used terms it was, as noted by the Commentary to the Geneva Conventions, “*possible to argue almost endlessly about the legal definition of war*”¹¹⁹ as “[a] state which uses arms to commit hostile act against another state can always maintain that it is not making war, but merely engaging in a police, or acting in legitimate self-defence.”¹²⁰ One of the examples of such a situation was the Japanese invasion of Manchuria, which was a de facto war between the Japan and China at the beginning of the 1930’s.¹²¹ Although there was, in reality, a long-term military confrontation between the two countries together with severe atrocities such as bombing of civilians or firing upon shell-shocked survivors, an official war was never declared by neither of fighting parties.¹²² Thus, various legal documents containing rules governing the situations of ‘war’ could not be applied.

The term ‘armed conflict’ was introduced during the 1940’ to avoid these situations and to sever the ties between the political factors and the application of the rules

¹¹⁷ Ibid. p 38.

¹¹⁸ Ibid. p 39.

¹¹⁹ Treaties, State Parties and Commentaries: Third Geneva Convention of 1949. Commentary. ICRC. <<https://www.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/07b4dad7719e37e4c12563cd00424d17>> accessed 20 June 2016.

¹²⁰ Ibid.

¹²¹ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 39.

¹²² HARRIES, Meirion and Susie. *Soldiers of the Sun: The Rise and Fall of the Imperial Japanese Army*. Random House, 1991 p 161.

of war. In other words, the decision whether there was ‘a war’ taking place had been frequently based on political declarations or disputable legal or subjective interpretations. On the other hand, the term ‘armed conflict’ is a broader one and the decision, whether there is an armed conflict taking place or not, is primarily based on objective factual circumstances.¹²³ Thus, the Geneva Conventions adopted in 1949 were drafted with the concept of ‘armed conflicts’ in mind. Regarding the exact meaning of the term, in 1995, in *the Tadic case*, the International Criminal Tribunal for Former Yugoslavia defined armed conflict as “[a] resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”¹²⁴ As can be noticed, the definition contains numerous vague or not clarified term, for example the notice to ‘protracted armed violence’. However, as recalled by Ondřej, Šturma, Bílková a Jílek: “*It is disputable whether it is even possible to make the definition more accurate. As there is a conflict of two legitimate interests: the interest to have the most accurate definition... and the interest to maintain necessary its flexibility.*”¹²⁵

4. 2 Inability of The Primary Actor to Cover the Needs of the Civilian Population

The second condition of the application of the relevant IHL legal norms governing the issue of humanitarian assistance is connected with the inability of the primary actor to provide the necessary assistance by itself. The primary actor can be a State or a non-state actor (e.g.: an armed group) depending on the type of the conflict.

As highlighted by numerous sources, for example by the International Law

¹²³ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 39-40; How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law. *ICRC. Opinion paper*. March 2008.

<<https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>> accessed 20 June 2016.

¹²⁴ ICTY, *Prosecutor v Dusko Tadic*, Case No. IT-94-1-AR72, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 para 70.

¹²⁵ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 39-40.

Commission¹²⁶, the UN GA¹²⁷, the Commentary to the AP II¹²⁸ or by various scholars¹²⁹, the primary subjects in chief of the organizing of relief actions are States. The role of other actors, providers of humanitarian assistance, should be of a subsidiary character; reserved for those situations when the primary actor is unable to adequately fulfil the task. This aspect also mirrors the above-mentioned non-forcible character of humanitarian assistance and its distinction from the so-called ‘humanitarian intervention’. Providers of humanitarian assistance are, as noted by the Commentary to APs, “... *called upon to play an auxiliary role by assisting the authorities in their task.*”¹³⁰

In other words, a humanitarian action should take place once, when the affected State, or the armed group controlling the area, are unable to cover the basic needs of the civilian population and thus prevent its suffering.¹³¹ In such situation, the role of the providers of humanitarian assistance should complement the efforts undertaken by the State or the party controlling the particular territory.¹³² On the other hand, when the party to the conflict is capable to adequately cover the needs of the civilian population, there is no need for a humanitarian action to be undertaken. Nevertheless, it is worth the notion than in reality such situations are rare exceptions.

4. 3 Level of Suffering of the Civilian Population

Another requirement to be fulfilled for humanitarian assistance to take place is a certain level of the suffering of the civilian population caused by the lack of basic supplies

¹²⁶ PERERA, Rohan. *Statement of the 60th Session of the International Law Commission*, Geneva, 18 July 2008 <www.lankamission.org/content/view/579/> accessed 20 June 2016.

¹²⁷ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (n 9).

¹²⁸ *Commentary to the Additional Protocol II*. In: *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949*. ICRC. Geneva: Martinus Nijhoff Publishers, 1987 para 4878.

¹²⁹ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation. *International Review of the Red Cross*. 2013 Vol. 95. Issue 890 p. 356; SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 15-25; BARBER, Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law. *International Review of the Red Cross*. June 2009. Vol. 91. No. 874. p 18-19.

¹³⁰ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 1477.

¹³¹ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 27.

¹³² *Ibid.*

and services. Thus, even when there is a situation of an armed conflict and the affected State is not able to cover all needs of the civilian population, the suffering caused by the situation has to reach to a certain level for the relevant IHL provisions of humanitarian assistance to be applicable. This condition is only logical as it is inherently linked to the very essence of armed conflicts that they negatively influence the life quality of those affected by them. However, the scope of their impact on the civilian population depends on various factors. Therefore, it does not always lead to such lack of supplies and services which would endanger civilian lives. As will be demonstrated, the threshold which has to be reached depends on the type of the conflict and the legal instruments applicable.

Regarding the situations of occupied territories in IACs, Art 59 of the Geneva Convention IV sets relatively low threshold stating that a humanitarian action should take place once when “*the whole or part of the population of an occupied territory is inadequately supplied.*”¹³³ As the case of civilians living in non-occupied territories is concerned, Art 23 of the Geneva Convention IV does not literally specify a certain level of suffering of the civilian population as a preliminary condition to be met. Nevertheless, according to Gillard, when reading between the lines it can be deduced that there has to be, at least, a need for the particular supplies enlisted by Art 23, e.g.: medical and hospital stores, foodstuff or clothing.¹³⁴ When read together with the AP I, the threshold appears to be quite similar as in the case of occupied territories as Art 70 of the AP I states that relief actions shall be undertaken “*if the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Art 69...*”¹³⁵

The main difference between the provisions regarding occupied territories and to the non-occupied territories as provided by the Geneva Convention IV on one hand and by the AP I on the other hand, considered from the ‘level of suffering due to the lack of supplies and services’ point of view, is in the lists of the supplies which have to be unavailable or lacking. Art 59 of the Geneva Convention IV, applicable to the occupied territories, makes reference to foodstuff, medical supplies, and clothing. However, the list

¹³³ Fourth Geneva Convention (n 6).

¹³⁴ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 9.

¹³⁵ Additional Protocol II (n 7).

seems to be rather demonstrative than exhaustive as the provision states that the humanitarian assistance shall “*consist, in particular, of the provision of consignments of foodstuff, medical supplies and clothing.*”¹³⁶ Art 23 of the Geneva Convention IV, applicable to non-occupied territories, mentions “*consignments of medical and hospital stores and objects necessary for religious worship intended only for [all] civilians of another High Contracting Party*” and “*consignments of essential foodstuff, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.*”¹³⁷ Regarding the AP I, Art 70 makes reference to Art 69 which enlists “*clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population...and objects for religious worship.*”¹³⁸ Obviously, the scope of the supplies stated by Art 69 of the AP I is broader than the one given by Art 23 of the Geneva Conventions IV. For example, Art 23 of the Geneva Convention IV limits the consignments of foodstuff only to certain groups of the civilian population. Nevertheless, when taking into account the practical point of view, it can be concluded that in the reality these above-mentioned differences are not significantly important. That is to say that, for example, in the context of Art 23 of the Geneva Convention IV, it can be presumed that no one will examine whether mothers, children under fifteen, and maternity cases are the only groups suffering from the lack of foodstuff. Rather, the situation of the whole population will be examined regarding to all essential supplies: foodstuff, medicaments, clothing, bedding, and the means of shelter.

In contrast with IACs, where the thresholds are relatively similar, the regulation of NIACs is quite a different story; once again showing the significant difference between the legal rules governing the situations of IACs and NIACs. Under Geneva Conventions the only provision applicable to NIACs is Common Art 3. As stated above, beside the incorporation of the right to humanitarian initiative, Common Art 3 does not contain any elaborated rules governing the issue of humanitarian assistance. At least not at the first sight. However, as mentioned in Chapter 2.1.2.2, there are scholars who find a correlation between certain obligations relating to humanitarian assistance and the prohibition of violence to life and person or cruel treatment as guaranteed by Common Art 3. In such

¹³⁶ Fourth Geneva Convention (n 6).

¹³⁷ Ibid.

¹³⁸ Additional Protocol I (n 7).

case, the prohibition of violence to life and person or cruel treatment would also indicate where the threshold necessary for the triggering of the humanitarian assistance lies. Thus, there would be need for a humanitarian action to take place once when the humanitarian situation would threaten the survival of the civilian population affected.

Contrary to Common Art 3, there is an explicit threshold in AP II as Art 18 provides that “[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuff and medical supplies...”¹³⁹ Therefore, there are two main conditions. First, the civilian population affected by NIAC has to suffer ‘an undue hardship’, and secondly, this hardship has to be caused by a lack of the supplies essential for its survival.

There are no details regarding to the term ‘undue hardship’ which would assist with its interpretation. Also, as stated by the Commentary to the AP II: “[I]t is not possible to draw up an exhaustive list of criteria to determine at what point the population is suffering ‘undue hardship’, but it is appropriate to take into account the usual standard of living of the population concerned and the needs provoked by hostilities, particularly medical requirements which are covered by the very general term ‘medical supplies’.”¹⁴⁰ Thus, it can be argued that the starting point for the assessment of each situation should be the standard of living of the particular population in the particular state before the outbreak of the conflict. This is actually an important argument which can have serious consequences and also quite a paradoxical result. The difference among the standards of living worldwide is enormous. For example, the GDP (per capita) of Norway in 2014 was 97,300 USD. The GDP of the Czech Republic was 19,526 USD. On the other hand, Haiti, Uganda, the Central African Republic, or, for example, Democratic Republic of Congo did not reach even 1,000 USD with the GDP of the Central African Republic making only 334 USD.¹⁴¹ A similar range of differences applies also to such areas as access to health care, water or foodstuff. Therefore, hypothetically, what could be considered as a ‘undue hardship’ for the civilians of an originally well-doing and developed state currently

¹³⁹ Additional Protocol II (n 7).

¹⁴⁰ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 1515.

¹⁴¹ GDP per Capita Ranking 2015. *Knoema*. 26 May 2016 <<https://knoema.com/sijweyg/gdp-per-capita-ranking-2015-data-and-charts>> accessed 20 June 2016.

struggling with NIAC, can be, when it comes to the availability of medical care and basic supplies, the everyday life of civilians living in another country.

Moving to the second condition, the undue hardship has to be caused by “*a lack of the supplies essential for its survival.*”¹⁴² Regarding the character of these supplies, the provision mentions foodstuff and medical supplies. Given the words used, “*...supplies essential for its survival, such as...*”, it can be presumed that the list is demonstrative and therefore not limited only to foodstuff and medical supplies.

When compared with the threshold set for the situation of non-occupied territories in IACs, the one created by Art 18 of AP II is clearly higher. As it can be presumed that ‘undue hardship’ applies to more serious situations than ‘inadequate provision’ of certain supplies. However, when compared with the conditions set by Common Art 3 as deduced above, the threshold is clearly lower as ‘undue hardship’ still does not have to mean a situation which threatens the lives of the affected civilian population.

Finally, it is also necessary to recall that “[t]he need for a relief action and the extent of its urgency must be assessed in every case individually on a factual basis depending on the actual requirements.”¹⁴³

¹⁴² Additional Protocol II (n 7) Art 18 para 2.

¹⁴³ SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance (n 10) p 6.

5. Beneficiaries and Providers of Humanitarian Assistance

5.1 Beneficiaries of Humanitarian Assistance

The aim of humanitarian assistance is to provide help to suffering civilian population and to the victims of armed conflicts. However, to properly interpret and apply those rules of IHL dealing with humanitarian assistance, it is also necessary to define the terms ‘civilians’ or ‘civilian population’ to determine who the beneficiaries of humanitarian assistance exactly are.

5.1.1 The Geneva Convention IV

As far as the Geneva Convention IV is concerned, the main relevant provision regarding humanitarian assistance are Art 10, Art 23, and Art 59. It is important to highlight that each of these provisions addresses different group of beneficiaries.

According to Art 10: “*The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organization may, subject to the consent of the Parties to the conflict concerned, undertake for the protection of civilian persons and for their relief.*”¹⁴⁴ The aim of this provision is to prevent other provisions of the convention from being interpreted and applied in a way which would pose obstacles for a humanitarian action undertaken by an impartial humanitarian organization under the consent of the Parties to the conflict. The beneficiaries of this provision are ‘*civilian persons*’. However, it is important to stress that the Geneva Convention IV does not provide a definition of the term ‘*civilian persons*’. It only defines the term ‘*protected persons*’. According to the Commentary to Geneva Conventions it is necessary to distinguish between these two terms. The Commentary suggests that the term ‘*civilian person*’ or also ‘*civilian*’ is broader and actually encompasses the term ‘*protected persons*’.¹⁴⁵ The argument that the term ‘*civilians*’ or ‘*civilian person*’ as used, for

¹⁴⁴ Fourth Geneva Convention (n 6).

¹⁴⁵ CLAPHAM, Andrew; GAETA Paola and SASSÓLI, Marco. *The 1949 Conventions: A Commentary*.

example, in Art 10 is broader supports also the fact that ‘*when the Geneva Conventions need to limit the scope of the word “civilian”, they do it expressly, as in the case of the wording of Art 23 [of the Geneva Convention IV]*’.¹⁴⁶

Regarding the situation of occupied territories, the Geneva Convention IV creates a highly protective regime identifying all the ‘population’ as the beneficiary of the obligation to provide humanitarian assistance imposed on the Occupying Power.¹⁴⁷ As stated by Art 59: “*If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population...*”¹⁴⁸ As can be noted, the provision omits qualifying the said population as ‘civilian’. By doing so it determines that the beneficiary of the said relief schemes is the whole population of the occupied territory, not only the ‘civilian population’. Thus, the wording of the provision implies that “*the benefit also extends to members of the armed forces belonging to the occupied state and detained in the occupied territory.*”¹⁴⁹ This was also noted by the travaux préparatoires according to which: “*The Working Party has omitted the word ‘civilian’ before the word ‘population’ ... being of the opinion that the case of relief intended for troops in camps in occupied territory must also be provide for.*”¹⁵⁰

This being said, although the Geneva Convention IV does not provide a definition of the term ‘civilian person’ or ‘civilian’, such a definition can be found in the AP I. As will be examined in the following subchapter, there is also a definition of the term ‘civilians’ which has emerged as part of international customary law.

Oxford: OUP, 2015 p 237.

¹⁴⁶ The Art 23 concerns the obligations of to allow free passage of consignments in favour of citizens of another Contracting Party, even if the latter is its adversary.

Ibid p 237.

¹⁴⁷ Fourth Geneva Convention (n 6) Art 59; Ibid. p 237.

¹⁴⁸ Fourth Geneva Convention (n 6) Art 59.

¹⁴⁹ CLAPHAM, Andrew; GAETA Paola and SASSÓLI, Marco. *The 1949 Conventions: A Commentary.* (n 144) p 238.

¹⁵⁰ Travaux Préparatoires, Final Record, vol. II-A, p 745. <https://www.loc.gov/rr/frd/Military_Law/RC-Fin-Rec_Dipl-Conf-1949.html> accessed 20 June 2016.

5.1.2 The Additional Protocol I to the Geneva Conventions and the International Customary Law

The AP I. provides a negative definition of civilians in Art 50 determining that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.” Thus, civilians are all persons who are not combatants (members of armed forces).¹⁵¹

Regarding international customary law, according to Rule 5 of the ICRC Study, the definition is the same as the one created by the AP I.: “*Civilians are persons who are not members of the armed forces.*”¹⁵² The same applies to the definition of ‘civilian population’. According to both the AP I and the ICRC Study, “[t]he civilian population comprises all persons who are civilians.”¹⁵³ It is crucial to note that in case of doubts there is a presumption of the status of civilian. Thus, until the opposite is proved the person whose status is in doubt is considered to be a civilian.¹⁵⁴

Regarding those specific provisions of the AP I which deal with humanitarian assistance, Art 70 of the AP I. uses following words: “*If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided...*”¹⁵⁵ Thus, the beneficiary of the humanitarian assistance is the civilian population of the affected territory; not only the civilian population of another High Contracting Party as was the case of Art 23 of the Geneva Convention IV. The same applies also to the occupied territories. According to Art 68 of the AP I: “*...the Occupying Power shall... also ensure the provision of clothing, bedding, means of shelter, other supplies essential for the survival of the civilian population of the occupied territory*

¹⁵¹ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 169.

¹⁵² Customary International Law. Database. Rule 5. *International Committee of the Red Cross*. <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5> accessed 20 June 2016.

¹⁵³ Ibid.; Additional Protocol I (n 7) Art 50 para 2.

¹⁵⁴ Additional Protocol (I) Art 50 para 1; ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 169; Customary International Law. Database. Rule 5 (n 151).

¹⁵⁵ Additional Protocol I (n 7).

and objects necessary for religious worship.”¹⁵⁶ Interestingly, in this case, contrary to Art 59 of the Geneva Convention IV, the provision does limit the beneficiaries to ‘*civilian population*’ instead of using broader term ‘*population*’. By doing so the provision excludes members of the armed forces belonging to the occupied state and detained in the occupied territory from beneficiaries of this rule.

5.1.3 The Additional Protocol II to the Geneva Conventions and the International Customary Law

When addressing the beneficiaries of humanitarian assistance, Art 18 of the AP II. uses the term ‘*civilian population*’. However, contrary to the AP, the AP II. does not contain a definition of the term ‘*civilian*’ or ‘*civilian population*’. According to the ICRC Study, a definition similar to the one which was encompassed in the AP I was included also in the draft of Additional Protocol II.¹⁵⁷ The definition used by the AP I was amended to read that “*a civilian is anyone who is not a member of the armed forces or of an organized armed group*” and it was subsequently adopted by consensus in Committee III of the Diplomatic Conference which led to the adoption of the AP II. However, the definition was dropped at the last moment of the conference as part of a package aimed to simplify the text.¹⁵⁸ As noted by Kalshoven, the lack of the definition is a significant and damaging omission, since the distinction between civilians and armed forces tends to be more difficult to draw in NIACs.¹⁵⁹

When considering the identity of the beneficiaries of Art 18, the Commentary to the AP II. states following: “*The civilian population means all persons who do not or no longer participate in hostilities, including those deprived of their liberty for having committed an act related to the conflict.*”¹⁶⁰ To support this opinion the commentary refers to Art 5 para (1)(c) of the AP II which expressly recognized the right of persons

¹⁵⁶ Additional Protocol I (n 7).

¹⁵⁷ Customary International Law. Database. Rule 5 (n 151).

¹⁵⁸ Ibid.

¹⁵⁹ KALSHOVEN, Frits. The Centennial of the First International Peace Conference: Reports & Conclusions. Leiden: Martinus Nijhoff Publishers, 2000, p 234.

¹⁶⁰ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 1515.

deprived of their liberty to receive relief: “[Persons whose liberty has been restricted] shall be allowed to receive individual or collective relief.”¹⁶¹

As far as customary international law is concerned, the definition which, according to the ICRC Customary Study, emerged as a norm of customary international law applies to both IACs and NIACs. Thus, “[c]ivilians are persons who are not members of the armed forces”¹⁶² and “[t]he civilian population comprises all persons who are civilians.”¹⁶³

5.2 Providers of Humanitarian Assistance

According to the Commentary to Geneva Conventions, there are four main types of providers of humanitarian assistance: States, international organizations, the ICRC and its kindred organizations, and non-governmental organizations.¹⁶⁴

5.2.1 States

The Geneva Convention IV and the AP I do mention States as providers of humanitarian assistance, however, these references are made only in the context of occupied territories and those States which are in the position of Occupying Powers.¹⁶⁵ However, despite the fact that the Geneva Convention IV and the AP I did not mention States as providers of humanitarian assistance also outside the framework of occupying territories, in nowadays reality States are one of the main contributors. As noted in the Commentary to Geneva Conventions: “[States] are frequently involved in relief activities through their civilian and military personnel, both of which are increasingly trained and specialized in providing assistance in situations of both natural disaster and armed

¹⁶¹ Additional Protocol II (n 7) Art 5 para (1)(c).

¹⁶² Customary International Law. Database. Rule 5 (n 151).

¹⁶³ Customary International Law. Database. Rule 5 (n 151); Additional Protocol I (n 7) Art 50 para 2.

¹⁶⁴ CLAPHAM, Andrew; GAETA Paola and SASSOLI, Marco. *The 1949 Conventions: A Commentary*. (n 144) p 238.

¹⁶⁵ Ibid.

conflict...’’¹⁶⁶ For example, the United States are generally considered to be the biggest provider of humanitarian assistance in the world.¹⁶⁷

Given the fact how complex logistic network it is necessary to create in order to successfully gather, deliver, and provide humanitarian assistance, the main benefits of States as providers of humanitarian assistance is, undoubtedly, the scope of their resources, their know-how and experience, and also the capacity and the discipline of their personnel.

On the other hand, there are also potential weaknesses and problems of the strong States’ involvement in the provision of humanitarian assistance. No matter the origin of the provider, the aid or help delivered in the context of an armed conflict has to have a certain character to be regarded as ‘humanitarian assistance’. Meaning, as will be closely examined in the following chapter, it has to respect the principles of humanity, neutrality, and impartiality. States as providers of humanitarian assistance are often under the suspicion of pursuing other interests than the humanitarian ones. This being said, their actions are frequently seen as an effort to enforce their own political or even military aims.

For example, on 11 August 2014 Russia announced its plan to dispatch a humanitarian convoy to Luhansk, a Ukrainian city which, finding itself in the midst of a NIACs, was cut off from electrical power, water, food, and gas supplies.¹⁶⁸ The convoy was presented as being of an exclusively humanitarian character delivering only supplies necessary for the civilian population (e.g.: grain, sugar, sleeping bags or medicaments).¹⁶⁹ The announcement met with a swift refusal from the Ukrainian government and a wave of criticism and suspicion coming mainly from the governments of Western countries and from the top representatives of NATO. By its opponents the convoy was often compared to the infamous Trojan horse opening a way for a possible Russian military invasion of

¹⁶⁶ Ibid.

¹⁶⁷ At a glance: United States Humanitarian Policy. *European Parliament*. May 2016
<[http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/582036/EPRS_ATA\(2016\)582036_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2016/582036/EPRS_ATA(2016)582036_EN.pdf)>
accessed 20 June 2016.

¹⁶⁸ Russia to send humanitarian convoy into Ukraine in spite of warnings. *The Guardian*. 11 August 2014.
<<https://www.theguardian.com/world/2014/aug/11/russia-humanitarian-convoy-ukraine>> accessed 20 June 2016.

¹⁶⁹ Ibid.

Ukraine.¹⁷⁰ On the other hand, the Russian representatives accused the Ukrainian government of a deliberate obstruction of a well-intentioned humanitarian assistance. According to the Russian side the aim of the obstruction had nothing to do with IHL as with the effort to gain a military advantage and prolong the suffering of civilians in Luhansk.¹⁷¹

5.2.2 International Organizations

International organizations as providers of humanitarian assistance frequently benefit from similar advantages as States as far as the amount and scope of resources and the know-how and experience are concerned. Moreover, a humanitarian action carried out by a well-established and respected international organization will less likely face a suspicion of having ulterior political or military motives. On the other hand, the decision-making process concerning the launch of a humanitarian action can be more complicated as it depends on the interests and opinions of its members. Among the international organizations which also focus on the provision of humanitarian assistance are virtually all main regional international organizations as, for example, the African Union, the Arab League, the European Union, the Association of Southeast Asian Nations or the Caribbean Community.

On the global scale the most important and active international organization in the context of humanitarian assistance is the United Nations. As stated by Art 1 para 3 of the United Nations Charter, it is one of the main purposes of the organization “*to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character...*”¹⁷² The part of the system responsible for coordinating responses for emergencies is The Office for the Coordination of Humanitarian Affairs of the United Nations Secretariat (‘OCHA’).

¹⁷⁰ Ibid; Ukraine Conflict: Russian Aid or Trojan Horse? *BBC*. 22 August 2014
<<http://www.bbc.com/news/world-europe-28752878>> accessed 20 June 2016.

¹⁷¹ Russian Aid Convoy Prompts Suspicion and Jokes. *BBC*. 13 August 2014.
<<http://www.bbc.com/news/world-europe-28773542>> accessed 20 June 2016.

¹⁷² United Nations, Charter of the United Nations (n 62) Art 1 para 3.

5.2.3 The ICRC, the International Federation of Red Cross and Red Crescent and the National Societies

The International Red Cross and Red Crescent Movement which consists of the ICRC, the International Federation of Red Cross and Red Crescent, and the National Red Cross and Red Crescent Societies is a global humanitarian network and also one of the main and most respected providers of humanitarian assistance.¹⁷³ The ICRC, as the oldest body of the International Red Cross and Red Crescent Movement, “*is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance*” and “[*it*] is responsible for directing and coordinating the Movement's international relief activities.”¹⁷⁴ Regarding the National Societies of Red Cross and Red Crescent, there are currently 190 of them around the world and “[*they are*] made up of volunteers and staff, who provide a wide variety of services, ranging from disaster relief and assistance for the victims of war, to first aid training and restoring family links.”¹⁷⁵

It is important to note that the ICRC and the National Societies of Red Cross and Red Crescent are the only organizations literally mentioned by the Geneva Conventions and by the APs as possible providers of humanitarian assistance. This does not mean, of course, that they are the only possible providers, but that the relevant provisions usually use them as a ‘role-model’. For example, when speaking about humanitarian action in the context of occupying territories, Art 59 of the Geneva Convention IV directly refer to the ICRC stating that: “*Such [relief] schemes...may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross...*”¹⁷⁶ Regarding the national societies, one of numerous examples can be found in Art 18 para 1 of the AP II which directly refers to them: “*Relief societies located in the*

¹⁷³ The International Red Cross and Red Crescent Movement. ICRC. <<https://www.icrc.org/en/who-we-are/movement>> accessed 20 June 2016.

¹⁷⁴ The International Red Cross and Red Crescent Movement: ICRC. ICRC. <<http://www.ifrc.org/en/who-we-are/the-movement/icrc/>> accessed 20 June 2016.

¹⁷⁵ National Societies. *International Federation of Red Cross and Red Crescent Societies*. <<http://www.ifrc.org/en/who-we-are/the-movement/national-societies/>> accessed 20 June 2016.

¹⁷⁶ Fourth Geneva Convention (n 6).

territory of the High Contracting Party, such as Red Cross (Red Crescent, Red Lion and Sun) organizations, may offer their services for the performance of their traditional functions in relation to the victims of the armed conflict."¹⁷⁷ It is worth a notion that the provision speaks about the 'traditional functions' of these organizations clearly addressing their long existence and also their traditional and respected position.

Speaking about tradition and respect, these two factors are one of the most significant advantages of the ICRC and the National Societies of Red Cross and Red Crescent often allowing them to reach people and places which are for other humanitarian actors inaccessible.

5.2.4 Non-Governmental Organizations

Under the term 'non-governmental organizations' ('NGOs') are generally understood voluntary, usually non-profit, private organizations, not affiliated with any government, and pursuing public policies and goals.¹⁷⁸ They can be organized on local, regional, or international level.

As mentioned above, the ICRC and the National Societies of Red Cross and Red Crescent are the only organizations literally mentioned by the Geneva Convention IV and the APs as possible providers of humanitarian assistance. However, the wording of the relevant provisions clearly suggests that NGOs as private entities can also offer their services as the references to the ICRC and to the National Societies of Red Cross and Red Crescent are merely of a demonstrative character.¹⁷⁹ As noted by the Commentary to the APs: "*The term 'relief society' should be understood in its traditional broad sense. The Red Cross Movement, while playing a role of prime importance, does not have a*

¹⁷⁷ Additional Protocol II. (n 7).

¹⁷⁸ Non-governmental Organization. *Encyclopaedia Britannica* <<http://www.britannica.com/topic/nongovernmental-organization>> accessed 20 June 2016; NGO. *NGO Global Network*. <<http://www.ngo.org/ngoinfo/define.html>> accessed 20 June 2016.

¹⁷⁹ STOFFELS, Ruth. Legal Regulation of Humanitarian Assistance in Armed Conflicts: Achievements and Gaps (n 50) p 19.

monopoly on humanitarian activities, and there are other organizations capable of providing effective assistance.”¹⁸⁰

Among the most active, respected, and well-established NGOs providing humanitarian assistance are, for example, the Doctors Without Borders, Oxfam, or the International Rescue Committee.

Finally, it is important to stress, as was also mentioned in relation to States as providers of humanitarian assistance, that no matter its character (e.g.: State, NGOs, international organization), all providers of humanitarian assistance have to proceed with respect and in accordance with the principles of humanity, neutrality, and impartiality.

¹⁸⁰ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p. 1513.

6. Character of Humanitarian Assistance

As mentioned above, not every kind of help or aid provided in the context of an armed conflict can be regarded as ‘humanitarian assistance’. The institute of humanitarian assistance in armed conflicts is governed by the above-mentioned applicable provisions of IHL. Those concern not only the process of providing of the assistance, but also its character. Thus, for an action or assistance to qualified as ‘humanitarian assistance’ under IHL, it has to have to be of a nature requested by these legal provisions. In other words, any action or assistance which does not comply with the criteria and principles given by these legal rules would simply be not covered by them.¹⁸¹

According to the majority of legal doctrine and international actors, the institute of humanitarian assistance is based on three fundamental principles which have to be respected¹⁸². These are – humanity, neutrality, and impartiality.¹⁸³ Together they created a ‘triad’, mentioned also in the UN GA resolution 46/182 (1991) which states that: “*Humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality.*”¹⁸⁴ However, it is important to note that the exact applicability and content of some of these principles is not fully established and remains questionable. More attention to this issue will be given later.

Regarding the applicable legal framework, the Geneva Conventions and their Additional Protocols do not literally mention the terms ‘principles’ or ‘fundamental principles’.¹⁸⁵ They can be seen more as a concept created through the years by the legal

¹⁸¹ Ibid p. 853

¹⁸² MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34); SPIEKER, Heike. *The Right to Give and Receive Humanitarian Assistance* (n 10) p 8-9; UN SC Resolution S/RES/1674 28 April 2006 para 21 voting record 15-0-0.

¹⁸³ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (n 9), SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 13-17; Humanitarian Negotiations with Armed Groups. *OCHA*. January 2006, p. 25.
<<https://docs.unocha.org/sites/dms/Documents/HumanitarianNegotiationswArmedGroupsManual.pdf>> accessed 20 June 2016.

¹⁸⁴ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (n 9).

¹⁸⁵ Art 63 of the Geneva Convention IV refers to ‘Red Cross Principles’ however only in the context of the activities of National Red Cross Societies.

doctrine. Nevertheless, the legal instruments do clearly specify the character of relief actions putting emphasis especially on the aspects of humanity and impartiality.

The most elaborated provision is offered by Art 18 of the AP II which speaks about: “*relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction.*”¹⁸⁶ Art 70 of the AP I. contains similar provision requesting relief actions aimed to civilian population to be: “*...humanitarian and impartial in character and conducted without any adverse distinction...*”¹⁸⁷ While comparing the exact wording of these two provisions, there is a visibly stronger emphasis on the ‘*exclusively humanitarian*’ nature of the relief actions given by the AP II. Taking into account the fact that the AP II governs the situations of NIAC, it can be presumed that this emphasis is one of the many cases of the AP II drafters trying to highlight and protect the principle of state sovereignty and underline the ‘non-intervening’ character of humanitarian assistance as much as possible. As for the Geneva Conventions, Art 59 of the Geneva Convention IV states that a relief action may be undertaken by States or by ‘*impartial humanitarian organizations*’; putting emphasis on the impartiality but, which is interesting, not including expressly also the requirement of the action itself to be of a humanitarian nature.

At this point, it is important to recall that although there are provisions governing the issue of humanitarian assistance in the Geneva Conventions and their Additional Protocols as well as provisions requiring these actions to be guided by certain principles, there are no definitions or more detailed specifications of the terms ‘humanitarian’ or ‘impartial’ in these instruments. Thus, to determine what it actually means for a humanitarian assistance to be impartial or humanitarian, it is necessary to examine also the available practice and opinions of legal doctrine and relevant international actors. This will be done in a great detail in the following sub-chapters. Each sub-chapter will be dedicated to one of the three fundamental principles.

¹⁸⁶ Additional Protocol II (n 7) para 18.

¹⁸⁷ Additional Protocol I (n 7).

It should be noted at this point that the character of humanitarian assistance was addressed also by the International Court of Justice ('the ICJ') in 1986 in the *Nicaragua vs. United States case*.¹⁸⁸ When examining the principle of non-intervention, the ICJ ruled that "*the provision of strictly humanitarian aid to persons or forces in other country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention.*"¹⁸⁹ However, the ICJ highlighted, there are characteristics of such aid which have to be present and as a guide used the first and second fundamental principles declared by the Twentieth International Conference of the Red Cross; namely the principle of humanity and the principle of impartiality (non-discrimination).¹⁹⁰ Thus, according to the ICJ such an action must be "*limited to the purposes hallowed in the practice of the Red Cross, namely 'to prevent and alleviate human suffering', and 'to protect life and health and to ensure respect for the human being'*"¹⁹¹ and it must be undertaken with respect to the principle of non-discrimination.¹⁹² Once when the action fulfils these requirements, it should not be regarded as an interference in the armed conflict or as a hostile act. The same applies for a mere offer of a humanitarian assistance.¹⁹³

6. 1 Principle of Humanity

The origin of the English word 'humanity' comes from the French '*l'humanité*'; meaning the feeling of active kindness or goodwill towards all the mankind.¹⁹⁴ The original meaning of the word reflects also the core of the principle itself. The affected civilian population and the aim to provide it with the necessary aid and supplies should always be at the core of every humanitarian assistance. According to Jean Pictet, the word 'humanitarian' characterizes "*any action beneficent to man*".¹⁹⁵ In the doctrine of

¹⁸⁸ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)*, 27 June 1986, 1986 ICJ 14.

¹⁸⁹ *Ibid* para 243.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid*.

¹⁹² *Ibid*.

¹⁹³ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 856.

¹⁹⁴ L'humanité. LITRÉ, Émile: *Le Dictionnaire de la langue française*

<<http://littre.reverso.net/dictionnaire-francais/definition/humanit%C3%A9>> accessed 20 June 2016.

¹⁹⁵ The Fundamental Principles of the Red Cross: A Commentary. ICRC. 1 January 1979.

the ICRC, the principle of humanity has three elements: a) to prevent and alleviate suffering b) to protect life and health (through providing the necessary aid and treatment) and c) to assure respect for the individual.¹⁹⁶ An action or an assistance of a humanitarian nature should always aim to contain these elements. Nonetheless, it should be noted that in the real world it is probably impossible to fully achieve all of them. No humanitarian assistance, no matter its scale or economic or human resources invested, is capable to completely prevent and alleviate all suffering or to protect the life and health of all members of the affected civilian population. However, the principle does not demand from it to do so. In this case, the main issue is the very intention of the action and its implementation, not the result.

As stated by Sandvik-Nylund: “*The principle of humanity dictates that such aid should consist of goods and services essential to the survival of the population, that it should be provided to the civilian population deprived of the basic necessities of life as a result of conflict, and that the purpose of the aid should be to alleviate human suffering and protect human life, health and dignity.*”¹⁹⁷

As stated by the Commentary to the AP I, “[t]he humanitarian character of the relief action is fulfilled once it is clear that the action is aimed at bringing relief to victims; i.e., in the present case, the civilian population lacking essential supplies.”¹⁹⁸ With the principle of humanity is closely tied also the very nature of the services and items provided by the humanitarian assistance. The principle is violated when the aid is not provided with the intention to help the civilian population, but it aims to support, directly or indirectly, one of the parties to the conflict.¹⁹⁹ For example, the provision of military material or services of a military nature cannot, naturally, fall within the scope of ‘humanitarian assistance’.

<<https://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>> accessed 20 June 2016.

¹⁹⁶ Ibid.

¹⁹⁷ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 13-17.

¹⁹⁸ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 817-818.

¹⁹⁹ Ibid.

6. 2 Principle of Impartiality

The second fundamental principle is the principle of impartiality. Art 59 of the Geneva Convention IV, Art 18 of the AP II and Art 70 of the AP I; all these provisions mention the requirement of ‘impartiality’, either in the connection with the nature of the humanitarian assistance provided or with the character of the provider. According to OCHA: *“Humanitarian assistance must be provided without discriminating as to the ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress.”*²⁰⁰

Jean Pictet, when working on the fundamental principles of the ICRC, isolated three elements of impartiality.²⁰¹ All of them can be found in the definition above: non-discrimination, proportionality, and the absence of subjective distinction.

Regarding non-discrimination, *“[n]o distinction should be made between the beneficiaries of aid for the sole reason of belonging to a particular group, except on the ground of humanitarian necessity.”*²⁰² The prohibition of such discrimination in the context of humanitarian assistance is specifically enshrined in both Additional Protocols to the Geneva Conventions. Art 18 of AP II as well as Art 70 of AP I requires for the relief actions for the civilian population to be conducted *“without any adverse distinction.”* Regarding specific kinds of adverse distinction, Art 9 of the AP I and Art 1 of AP II provide open-list stating the following: race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Thus, the principle of non-discrimination refers to the real object of the humanitarian action, the persons who are suffering, and removes all objective distinctions between these individuals.²⁰³

²⁰⁰ Humanitarian Negotiations with Armed Groups. OCHA. (n 182) Box 1.

²⁰¹ The Fundamental Principles of the Red Cross: A Commentary. ICRC. (n 194).

²⁰² SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 15.

²⁰³ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 854.

The second element of the principle of impartiality, as identified by Jean Pictet, is the principle of proportionality which is closely linked with the above-mentioned principle of non-discrimination. While the principle of non-discrimination requires all human beings to be treated and valued equally, the principle of proportionality lays down the only criteria according to which the humanitarian assistance should be distributed among the suffering civilian population: the intensity of its need (so-called ‘*sharing according to needs*’).²⁰⁴ Thus, that the assistance will be afforded according to need. There is only rarely enough personnel, supplies, medication, and food to fully cover the needs of all affected civilians in the uneasy reality of current armed conflicts. Priorities must be made as to who will get the medical treatment first, how to distribute food packages when there is not enough of them for everyone, etc. Principle of proportionality demands the only acceptable determining factor for such a decision to be the actual need of the particular individual and its urgency. Therefore, the assistance should be distributed in a way which will correspond the greatest need.²⁰⁵

However, although the principle of proportionality in the context of humanitarian assistance is generally perceived as firmly embodied in IHL²⁰⁶, the actual scope of its applicability remains questionable. Generally, the principle should require for the humanitarian assistance to be first provided to those in the greatest need, no matter, for example, the side of the conflict. Yet, as highlighted by Mackintosh, there is no obligation of the providers of humanitarian assistance to actually operate on all sides of the conflict or on the whole territory of the conflict.²⁰⁷ Sometimes, some areas of the battlefield are less accessible for the assistance to be provided there or it is from the political, security or mere financial reasons even impossible for the providers to reach them. As observed by the Commentary to the AP I: “[*The principle of non-discrimination and the principle of proportionality are*] a general aim and an ideal which cannot always be achieved, especially in a limited action.”²⁰⁸

²⁰⁴ Ibid p 854.

²⁰⁵ The Fundamental Principles of the Red Cross: A Commentary: Impartiality. ICRC. (n 194).

²⁰⁶ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6.

²⁰⁷ Ibid.

²⁰⁸ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 854.

The most complicated, when facing the harsh reality of armed conflicts, is the last element of the principle of impartiality which requires that “*there should be no subjective distinction: no individual decision on whether the recipient is innocent or guilty, good or bad, and hence deserving or undeserving of assistance on any basis other than need.*”²⁰⁹ According to this principle, the moral questions of guilt and innocence, good and evil, and villains and victims have no space when determining the beneficiaries of humanitarian assistance. The main criteria should always be the level and the urgency of the need of the particular individual. Thus, for example, when seriously injured, a perpetrator of a war crime should be given the priority over an innocent little child in less critical condition. Of course, this is an extreme example. Nevertheless, the core aim of the principle remains the same: to remove any subjective distinctions.²¹⁰

This being said, the last decades brought numerous cases of the unwillingness of the international actors or also the public to truly understand and respect the full consequences of the implementation of this principle weighting its real implications on the scales of morality. For example, many called for a distinction to be made between the ‘good’ and the ‘bad’ during the aftermath of the Rwanda genocide. Among the Hutu which fled from the country during the last days of the genocide in the fear of the Rwanda Patriotic Front forces (‘the RPF’)²¹¹ were not only innocent citizens, but also the perpetrators of the genocide. According to Prunier, around two million Hutu fled Rwanda to refugee camps set up by the UNHCR in neighbouring countries.²¹² Given the high percentage of genocide perpetrators among the refugee camps population, the UNHCR and involved humanitarian organizations were by some criticised for ‘feeding the killers.’²¹³ Another case which got under the scrutiny and criticism of some States and

²⁰⁹ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6.

²¹⁰ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 854.

²¹¹ Once they crossed the borders, the presence of RPF forces led by Tutsi, Paul Kagame, accelerated the end of the genocide. However, thousands of Rwanda Hutu decided to flee the country in the fear of possible retaliation from the hands of RPF.

²¹² PRUNIER, Gérard. *The Rwanda Crisis: History of a Genocide*. Kampala: 1999, Fountain Publishers Limited, p. 312 – 314.

²¹³ LEADER, Nicholas. *The Politics of Principle: The Principles of Humanitarian Action in Practice*. London: Overseas Development Institute, 2000, p 23.

also the public were a first aid courses provided by the ICRC to the Taliban fighters in Afghanistan. Due to the fact that the courses were provided to the US armed forces, in order to maintain its impartial status, the ICRC offered them to the Taliban too.²¹⁴

6. 3 Principle of Neutrality

The last fundamental principle to be discussed is the principle of neutrality. Before moving forward, it is important to underline that although being often quoted as a principle of humanitarian assistance and actions, the principle of neutrality is not literally mentioned in the Geneva Conventions or in the Additional Protocols in the context of humanitarian assistance. Nevertheless, “*There are provisions [in the Geneva Conventions and the APs] that can relate to aspects of neutrality.*”²¹⁵ For example, Art 23 of the Geneva Convention IV obliges the party to the conflict to allow free passage of goods intended for the civilian population of another party to the conflict through its territory. However, the obliged party is obliged to do so only if it has no reason to fear that these goods may be diverted or that they may bring a military advantage to the enemy. Reference to the principle of neutrality and the obligation of the personnel of humanitarian organizations not to engage in hostilities can be found also in Art 71 para 4 of the AP I which states that: “*Under no circumstances may relief personnel exceed the terms of their mission under this Protocol... The mission of any of the personnel who do not respect these conditions may be terminated.*”²¹⁶

Although not being specifically mentioned in the Geneva Conventions and the APs, the principle of neutrality is often highlighted by various international actors.²¹⁷ As was stated above, neutrality is one of the principles demanded by the UN GA resolution 46/182 (1991), it is mentioned in the Charter of the Doctors without Borders²¹⁸ and it is one of the fundamental principles of the ICRC.²¹⁹ Neutrality of the provider of

²¹⁴ FORSYTHE, David. *The Humanitarians. The International Committee of the Red Cross.* (n 99) p 171.

²¹⁵ Humanitarian Principles and Humanitarian Assistance. *GSDRC.* (n 41).

²¹⁶ Additional Protocol I (n 7).

²¹⁷ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6.

²¹⁸ The Charter. *Doctor Without Borders.* <<http://www.doctorswithoutborders.org/about-us/history-principles/charter>> 21 June 2016.

²¹⁹ The Fundamental Principles of the Red Cross: A Commentary: Impartiality. *ICRC.* (n 194).

the humanitarian assistance is often expressively required also by the warring parties. For example, in Colombia, the Autodefensas Unidas de Colombia, a paramilitary group which was engaged in an armed conflict with the Colombian government from 1997 to 2006,²²⁰ when stating its criteria for accepting contact with humanitarian organizations, demanded also their impartiality, confidentiality, and neutrality.²²¹

Mackintosh identifies two elements of the principle of neutrality in the context of humanitarian assistance: ideological neutrality and non-participation in hostilities.²²² Ideological neutrality means that humanitarian organizations and their personnel should refrain from making public statements as to the reasons of the conflict and should refrain from expressing support to the cause of one of the parties to the conflict.²²³ By disrespecting the principle of ideological neutrality, a humanitarian organization could discredit itself and risk being seen as untrustworthy and having a bias. That could lead to the denial of its access to the conflict zone by the particular fighting party. For example, based on its long and stable reputation as a neutral organization, the ICRC was the only humanitarian organization initially allowed to access Mogadishu during the armed conflict in Somalia in 1990's.²²⁴ However, humanitarian organizations are not obliged to remain silent when facing serious violations of human rights.²²⁵ This approach has been adopted also by the ICRC. Although the organization generally maintains a strong commitment to the principle of neutrality and on the base of confidentiality does not provide detailed information regarding its activities and findings, it reserves the right to publish them in exceptional cases. Especially in the context of serious human rights or IHL violations when there was no improvement of the situation no matter its efforts and activities.²²⁶

²²⁰ Colombia. *UPSALA Conflict Data Program*.

<http://www.ucdp.uu.se/gpdata/gpcountry.php?id=35®ionSelect=5-Southern_Americas> accessed 20 July 2002.

²²¹ Humanitarian Negotiations with Armed Groups. *OCHA*. (n 182).

²²² MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6.

²²³ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 20.

²²⁴ NAFZIGER, E., WAYNE, F. a VAYRYNEN, R. (eds.). *War, Hunger and Displacement*. Vol. 2. Oxford: Oxford University Press, 2000, p. 220.

²²⁵ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 20.

²²⁶ Confidentiality: key to the ICRC's work but not unconditional. *ICRC. Interview*. 20 September 2010. <<https://www.icrc.org/eng/resources/documents/interview/confidentiality-interview-010608.htm>> accessed 20 June 2016.

Second element, is the obligation to refrain from hostile activities. Thus, humanitarian organization providing humanitarian assistance must not engage in the hostilities, directly or indirectly.²²⁷ As stated by Mackintosh, non-participation in hostilities is “*at the very core of the provisions for humanitarian assistance in the Conventions... as these are principally designed to ensure that relief does not advantage the adverse party, which might otherwise indirectly involve the relief providers in the conflict.*”²²⁸ This aspect, of non-participation in hostilities, is stressed also by the OCHA guidelines in the provision dealing with the issue of neutrality in the context of humanitarian assistance. It reads as follows: “*Humanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature.*”²²⁹ As a hostile conduct by humanitarian organizations and their personnel would be considered, for example, following: transporting weapons in their vehicles, storing weapons in their premises, attacking combatants, allowing one of the parties to use their logistic facilities and means of communication, spreading propaganda among the civilian population, using or disclosing strategic information, and enlisting troops.²³⁰ It should be noted than possession of weapons by the humanitarian personnel for their own personal defence and the use of private security personnel belonging to one of the warring parties for their premises or means of transport cannot be qualified as a hostile conduct.²³¹ Nonetheless, some humanitarian organizations, as for example the ICRC, made their own decision not to carry weapons and use the armed private security personnel for their protection in order to strengthen their neutral and unbiased character.²³²

²²⁷ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6; Humanitarian Negotiations with Armed Groups. OCHA. (n 182) p 25-29.

²²⁸ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6.

²²⁹ Humanitarian Negotiations with Armed Groups. OCHA. (n 182) Box 1.

²³⁰ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 20-23.

²³¹ Ibid.

²³² STECK, Robert. In Its Humanitarian Action, the International Committee of the Red Cross Applies Strict Neutrality and Secrecy. *The European Institute*. September 2010.
<<http://www.europeaninstitute.org/August-September-2010/in-its-humanitarian-action-the-international-committee-of-the-red-cross-applies-strict-neutrality-and-secrecy.html>> accessed 20 June 2016.

7. The Issue of Consent

There are two important questions connected with the issue of consent. First, in which situations a consent for the facilitation of humanitarian assistance has to be given, and secondly, from whom it should be sought. The legal framework differs depending on the type of armed conflict. Thus, different legal rules apply in situations of NIACs, IACs, and occupied territories in IACs.

As stated above, humanitarian assistance is a non-forcible measure based on the principles of neutrality, humanity, impartiality, and also on the respect towards the sovereignty of affected States. To forcibly push States to accept it would be a violation of the very principles on which the concept is built.²³³ However, on the other hand, States are bound by their obligations under IHL. These obligations affect also the issue of humanitarian assistance and the question whether there is a duty to accept it or not and if so, under which circumstances. Thus, the interpretation of the relevant legal provisions, encompassed in the Geneva Conventions and Additional Protocols, and the proper identification of relevant customary rules are crucial as *“the extent of the obligations relating to humanitarian assistance is completely dependent on the interpretation of the concept of agreement.”*²³⁴

7.1 The Obligation to Grant Consent to Humanitarian Assistance

The strongest provision leading to the conclusion that it must be allowed for humanitarian assistance to take a place, in order to alleviate the suffering of civilians, is Art 59 of the Geneva Convention IV. This particular provision applies in occupied territories.²³⁵ According to the article:

“If the whole or part of the population of an occupied territory is inadequately

²³³ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 6.

²³⁴ Ibid. p 32.

²³⁵ DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflicts*. Cambridge: CUP, 2010, p 225.

*supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal. Such schemes... may be undertaken either by States or by impartial humanitarian organizations such as the International Committee of the Red Cross...*²³⁶

According to Y. Dinstein, “*the obligation imposed on the Occupying Power to let such relief consignments reach the civilian population is unconditional*”.²³⁷ This opinion is supported also by a number of other scholars.²³⁸ However, as will be demonstrated, the same cannot be said about the obligation of parties in other types of armed conflicts.

Regarding the situation of civilians in the national territory of a party to IAC, the relevant provision is to be found in Article 70 of the AP I.

*“If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Art 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions...”*²³⁹

On the first sight the added phrase ‘subject to the agreements of the Parties concerned’ clearly reveals a greater concern for the protection of state sovereignty than the above-mentioned Article 59 of the Geneva Convention IV. However, it also creates a space for possible obstructions. As stated by Y. Dinstein: “*As long as relief actions are contingent on an agreement by all concerned, one cannot speak of a genuine obligation to enable free passage to humanitarian assistance to civilians.*”²⁴⁰

²³⁶ Fourth Geneva Convention (n 6) Art 59.

²³⁷ DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflicts* (n 234) p 226.

²³⁸ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 13; CLAPHAM, Andrew; GAETA Paola and SASSÓLI, Marco. *The 1949 Conventions: A Commentary*. (n 144) supra note 204 p 320.

²³⁹ Additional Protocol I. (n 7) art 70 para 1; regarding the supplies Art 69 mentioned clothing, bedding, means of shelter, and other supplies essential to the survival of the civilian population of occupied territory and objects necessary for religious groups.

²⁴⁰ DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflicts* (n 234) p 227.

At this point it should be noted that so far the AP I has been ratified by 174 states.²⁴¹ The United States of America, Iran, and Pakistan signed the protocol, but have not ratified it so far.²⁴² Another states, notably Turkey, India, and Israel, have not even signed it. The customary status of AP I is questionable.²⁴³

Nevertheless, regarding the consent to humanitarian assistance in the context of IHL customary law, according to the ICRC Study, although “*most practice collected does not mention this requirement [to be granted the consent] ... [I]t is nonetheless self-evident that a humanitarian organization cannot operate without the consent of the party concerned.*”²⁴⁴ This can be deduced also from the above-mentioned natural caution of states when it comes to possible interferences into their internal affairs. It is unthinkable that States would, out of their concern for sovereignty, have accepted the obligations regarding humanitarian assistance if the requirement of their consent with the action had not been included.²⁴⁵

The relevant treaty provision for NIACs is encompassed in Art 18 of the AP II.:

*“If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.”*²⁴⁶

Again, the access of humanitarian actors to the territory of the affected State is conditioned by its consent. The part of the text concerning the consent is slightly changed from the one used in Art 70 of the AP I as the phrase ‘subject to the agreement’ was replaced with ‘subject to the consent’. According to Sandvik-Nylund: “*The words are in*

²⁴¹Treaties, State Parties and Commentaries: Additional Protocol II to the Geneva Conventions. ICRC (n 53).

²⁴² Ibid.

²⁴³ See Chapter 2.1.2.1.

²⁴⁴ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

²⁴⁵ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 31-33.

²⁴⁶ Additional Protocol II (n 7).

principle synonymous. However, 'consent' seems to imply less formality in the way in which the permission is granted."²⁴⁷

It is important to note that so far the AP II has been ratified by 168 States.²⁴⁸ States like Pakistan, United States of America, and Iran signed it, but have not proceeded to the ratification.²⁴⁹ A number of others, like for example Iraq, India, Turkey or Israel, did not even signed it. Although moving slowly towards universal participation,²⁵⁰ its customary status is still disputable and not generally accepted.²⁵¹

In a NIAC situation involving a State which has not ratified the AP II, the only treaty law which remains applicable is Common Art 3 of the Geneva Conventions. Albeit there is a mention regarding humanitarian assistance in Common Art 3, it is of a strictly non-obligatory nature²⁵² stating that: "*An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.*"²⁵³ Thus, the said bodies can offer their help and assistance, however, there is no obligation imposed on the parties to the conflict to accept it.

Regarding the requirement of consent to humanitarian assistance in NIACs in the context of IHL customary, the ICRC Study presumes that there is a requirement of such consent also in the situations of NIACs.²⁵⁴ In other words, humanitarian assistance cannot take place without the consent of the relevant parties to the armed conflict. As was mentioned above, generally, States are very cautious about protecting their sovereignty when creating binding rules concerning IHL and humanitarian assistance. They are even more cautious when it comes to the rules governing NIAC; as can be deduced from the

²⁴⁷ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 32.

²⁴⁸ Treaties, State Parties and Commentaries: Additional Protocol II to the Geneva Conventions. *ICRC* (n 53)

²⁴⁹ *Ibid.*

²⁵⁰ AKANDE, Dapo. Afghanistan accedes to Additional Protocols to Geneva Conventions: Will AP II govern the conflict in Afghanistan? *EJIL: Talk!* <<http://www.ejiltalk.org/afghanistan-accedes-to-additional-protocols/>> accessed 20 June 2016.

²⁵¹ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts (n 63).

²⁵² RYNGAERT, Cedric. Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective. *Amsterdam Law Forum*. 2013. Vol. 5:2, spring issue, p 3.

²⁵³ First Geneva Convention, Second Geneva Convention, Third Geneva Convention and Fourth Geneva Convention (n 6).

²⁵⁴ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

travaux préparatoire of the AP II.²⁵⁵ Therefore, it is unlikely that they would support the creation of such a customary IHL rule which would allow humanitarian assistance to take place in NIACs without their consent.

7.2 Arbitrary Denial of the Consent

Having said that, the mere fact that the discussed legal rules require consent of the parties to the conflict does not mean that there are no limitations to the deliberation whether to grant such a consent or not. As stressed by Bothe et al. when interpreting Art 59 of Geneva Convention IV, Art 70 of the AP I, and Art 18 of AP II: *“If parties had an unlimited right to refuse assistance, the first part of the sentence(s), imposing an obligation that relief actions shall be undertaken, would be devoid of sense... Both parts of the sentence(s) have to have their weight: the obligation and the requirement of an agreement.”*²⁵⁶ Although there are situations when a party to the conflict can legally refuse to grant the consent for humanitarian assistance, such a decision cannot be arbitrary.

As stated by the Commentary to Geneva Convention IV, the acceptance of relief action is the rule, whereas refusal should always be considered an exception.²⁵⁷ *“Consent to humanitarian operation must be granted as a matter of principle... and can only be refused for valid and compelling reasons.”*²⁵⁸ A party refusing consent has to do so for ‘valid reasons’, not for ‘arbitrary or capricious one’.²⁵⁹ The opinion that a consent for humanitarian operations cannot be arbitrarily withheld has been supported by various scholars²⁶⁰ and documents of international organizations.²⁶¹ It is also considered to be a

²⁵⁵ BOTHE, Michael; PARTSCH Karl and SOLF, Waldemar. *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. The Hague/Boston: Martinus Nijhoff, 1982, p 694.

²⁵⁶ Ibid. p 435.

²⁵⁷ CLAPHAM, Andrew; GAETA Paola and SASSÓLI, Marco. *The 1949 Conventions: A Commentary*. (n 144) p 320.

²⁵⁸ BOTHE, Michael; PARTSCH Karl and SOLF, Waldemar. *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (n 254) p 434.

²⁵⁹ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 819.

²⁶⁰ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 36; DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflicts* (n 234) p 227; GILLARD, Emanuela-Chiara. *The Law Regulation Cross Border Relief Operation* (n 128) p 6.

²⁶¹ Guiding Principles on Internal Displacement. ADM 1.1, PRL 12.1. 22 July 1998, Principle 25; Resolution on Humanitarian Assistance. *Institute of International Law*, Bruges Session 2003,

customary rule according to the ICRC Study.²⁶²

So far there is little clarity about what kind of behaviour exactly qualifies as an arbitrary refusal of consent.²⁶³ There is no exact definition provided by the treaty law and so far the issue has never been addressed by an international or national tribunal, human rights mechanism or a fact-finding body.²⁶⁴ On the other hand, there are several examples which have been discussed by the doctrine or by the international community and which are generally accepted as establishing situations of the arbitrary denial of a consent to humanitarian assistance. An uncontroversial example is considered to be a situation “*when the civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation.*”²⁶⁵ Refusal to give consent to such an operation is considered as arbitrary not only by the ICRC,²⁶⁶ but also by various scholars.²⁶⁷

Another example, according to Gillard, is a situation when consent to medical relief operation would be refused on the grounds that medical supplies and equipment could be used to treat wounded enemy combatants.²⁶⁸ Such argumentation would be unacceptable due to the fact that wounded and sick – including the enemy’s combatants – are equally entitled, to the fullest extent practicable and with the least possible delay, to the medical care required by their health condition.²⁶⁹ No distinction on other basis than a medical one can be made.²⁷⁰ Based on the same reasoning, a denial of the consent to a humanitarian operation based on the intention to discriminate against a particular group

2 September 2003, Art. VIII (12).

²⁶² Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

²⁶³ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 10.

²⁶⁴ Ibid.

²⁶⁵ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

²⁶⁶ Ibid, BARBER, Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law. *International Review of the Red Cross*. June 2009. Vol. 91. No. 874.

²⁶⁷ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 34; 1 GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 32; DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflicts* (n 234) p 218 – 230., Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 2805.

²⁶⁸ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 21.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

or section of the population, for example because of its ethnicity, would be also considered as arbitrary.²⁷¹

Once given consent, can always be withdrawn. Nevertheless, such a withdrawal should always be based on a legitimate ground and it should never be arbitrary or used as a way to reach political aims or to gain political power. Unfortunately, the practice shows frequent cases of the opposite. For example, in March 2009, the Government of Sudan expelled 13 international NGOs and revoked the licences of three national NGOs operation in Darfur. The expulsion came shortly after the ICC issued an arrest warrant for the Sudanese president Omar Al-Bashir who was charged with war crimes and crimes against humanity.²⁷² This was not the first case when NGOs had been expelled from the Darfur area. In early 2006, the Norwegian Refugee Council, responsible for the co-ordination of humanitarian assistance in the Kalma camp (the largest camp for internationally displaced persons at that time in Darfur) was instructed to cease all its operations in Darfur.²⁷³ Similarly, in November 2007, the head of OCHA in South Darfur was expelled for unspecified violations of the ‘rules of humanitarian action’.²⁷⁴

7.3 Identity of the Party in Respect of which Consent is Required

An important question connected with the issue of consent is from whom it should be sought. In this case it is especially necessary to distinguish between the situations of IACs and NIACs as the identity of the parties to the conflict differ. Thus, the following sub-chapters will focus first on the IACs and then on the NIACs.

²⁷¹ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 11.

²⁷² BARBER, Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law (n 266) p 7.

²⁷³ Fact Sheet on Access Restrictions in Darfur and Other Areas of Sudan. *OCHA*. 20 April 2006. <www.ochaonline.un.org/OchaLinkClick.aspx?link=ocha&DocId=1004494> accessed 21 June 2016.

²⁷⁴ South Darfur authorities expel U.N. aid official: U.N. UNITED NATIONS. *Reuters*. 7 November 2007 <<http://www.canada.com/story.html?id=68908b79-49e3-40d0-a54d-e04d02228de6>> accessed 21 June 2016.

7.3.1 International Armed Conflicts

When it comes to IACs, the answer is not very complicated. Art 70 of AP I requires the consent of ‘the Parties concerned in such a relief action.’²⁷⁵ The most important is considered to be the consent of that State party to the conflict in whose territory the operations are intended to be implemented.²⁷⁶ Gillard also supports the opinion that “*although treaties does not expressly address this, it is clear that that consent is required both for relief actions carried out in-country and for cross-border operations*”²⁷⁷ and that “*the modalities of the operations do not affect the requirement of consent.*”²⁷⁸

The situation of occupied territories is governed by Art 59 of the Geneva Convention IV. According to this article, the consent to humanitarian assistance is to be sought from the occupying power, however, only under the condition that it is exercising effective control over the occupied territory and, consequently, has assumed responsibilities towards the civilian population.²⁷⁹

7.3.2 Non-International Armed Conflicts

In the cases of NIACs the situation is more complicated. Art 18 (2) of the AP II requires the consent of “*the High Contracting Parties concerned.*”²⁸⁰ Available sources show that the early draft of the provision referred to the consent of ‘the party or parties concerned’, implicitly referring also to non-state actors (e.g.: armed opposition groups, non-state armed groups). However, during the following negotiations the reference was removed together with other expressions which could be interpreted as recognizing insurgent parties or as granting rights to their members.²⁸¹ According to the Commentary,

²⁷⁵ Additional Protocol I (n 7).

²⁷⁶ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128).

²⁷⁷ Ibid. p 13.

²⁷⁸ Ibid. p 14.

²⁷⁹ Fourth Geneva Convention (n 6) Art 59.

²⁸⁰ Additional Protocol II (n 7) Art 18 (2).

²⁸¹ BOTHE, Michael; PARTSCH Karl and SOLF, Waldemar. *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (n 254) p 696; STOFFELS, Ruth. *La Asistencia Humanitaria en Los Conflictos Armados*. Valencia: Tirant Lo Blanch, 2001, p 301-308.

the phrase ‘High Contracting Parties’ refers to no other subject than to the State involved in the particular NIAC.²⁸² This view was supported by a number of scholars²⁸³ and also by some of the General Assembly resolutions adopted on the issue of humanitarian assistance.²⁸⁴ Thus, it can be concluded there is general understanding that the term ‘High Contracting Parties’ does not include the above-mentioned non-state actors.

Bearing this in mind, such interpretation of the term ‘the High Contract Parties’, however, does not automatically lead to the conclusion that the non-state actors are not bound by the relevant IHL rules. Although not parties to Geneva Conventions and the APs, according to numerous scholars and international actors,²⁸⁵ non-state actors, as for example armed opposition groups, are subjects *sui generis* of IHL and thus they are bound by the relevant IHL norms. Their subjectivity is considered to be of a functional character, meaning that it is derived from the factual part that they play in NIACs.²⁸⁶ The aim of this subjectivity vested upon them is to ensure that all parties to the conflict are equally obligated to respect relevant IHL norms.²⁸⁷ Thus, it can be deduced that according to this approach it would be necessary for the relevant provider of humanitarian assistance to obtain both, the consent of the State party and also the consent of the non-state actor.

It should be noted that there are also other approaches towards the relevant provision.

For example, according to some scholars, the consent of a non-state actor not supported by the consent of the relevant State party could suffice in situations where the humanitarian operation would transit only through such a part of the state territory, which

²⁸² Gillard (12), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 4423.

²⁸³ FLECK, Dieter (ed.). *The Handbook of International Humanitarian Law*. Oxford: OUP, 2013, p 236; KALSHOVEN, Frits and ZEGVELD, Liesbet. *Constraints on the Waging of War – An Introduction to Humanitarian Law*. Cambridge: CUP, 2001, p. 139.

²⁸⁴ UN GA Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations (n 9).

²⁸⁵ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 72; Inter-American Commission on Human Rights. *Juan Carlos Abella v. Argentina (La Tablada)*. Case No. 11.137. 18 November 1997. Report No. 55/97, para 174; UN SC Resolution S/Res/794 3 December 1992 para 4; UN SC Resolution S/Res/812 12 March 1993, para 8.

²⁸⁶ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 72.

²⁸⁷ Ibid. p 73.

would be effectively controlled only by the non-state actor, and would not intervene in the territory under the state control.²⁸⁸ Thus, according to this opinion, if the territory controlled by the opposition is accessible by a sea or can be directly reached from a third country territory, the consent of the government of the affected State would not be required.²⁸⁹ This approach is based on an analogy with the rules applicable in the situations of occupation. In such situations it is not the consent of the State with legal title which is required, but that of the State which has an effective control over the particular territory; thus the consent of the occupier.²⁹⁰

However, it is necessary to recall that those interpretations, which exclude the consent of the relevant State as a necessary requirement, face several obstacles. First, as was stated above, the AP II was adopted mainly with the States interests in mind, the generally accepted interpretation of the phrase ‘High Contracting Parties’ does not include non-state actors²⁹¹ and the AP II deliberately omits any reference to non-state actors as subjects of the IHL. Secondly, the relevant state practise shows that as a matter of fact, states generally consider themselves to be very concerned by humanitarian operations which are carried out in the opposition held territory and do not support their execution without their consent.²⁹² For example, in 1987 Sri Lanka strongly objected to the airdrops of humanitarian supplies for the Tamil population in the besieged city of Jaffna which were carried out by India without the Sri Lanka’s government consent. In reaction to the air drops, Sri Lanka accused India of violating its sovereignty and territorial integrity.²⁹³ It should be, however, noted that Sri Lanka’s reaction could be motivated not only by its legal opinion, but also by its tense political relations with India.

On the other side, any approach excluding the consent of non-state actors also

²⁸⁸ BOTHE, Michael; PARTSCH Karl and SOLF, Waldemar. *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (n 254) p 696; R. A. STOFFELS, Ruth. *La Asistencia Humanitaria en Los Conflictos Armados*. (n 281) p 696.

²⁸⁹ Ibid

²⁹⁰ BOTHE, Michael; PARTSCH Karl and SOLF, Waldemar. *New Rules for Victims of Armed Conflicts – Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (n 254) p. 94.

²⁹¹ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 4423.

²⁹² GILLARD, Emanuela-Chiara. *The Law Regulation Cross Border Relief Operation* (n 128) p 16.

²⁹³ BANDARAGE, Asoka. *The Separatist Conflict in Sri Lanka: Terrorism, Ethnicity and Political Economy*. London/New York: Routledge, 2009.

meets with obstacles, especially once when a territory under their control is concerned. It is unrealistic that a humanitarian assistance could be facilitated on a territory under the control of a non-state actor without its consent, especially from the security and logistic reasons. As noted by Gillard: *“Whatever the legal position, as a matter of practice the agreement or acquiescence of the opposition to relief operations for civilians in territory under its control, or transiting through such territory, will be required to implement the operations in a safe and unimpeded way.”*²⁹⁴ As stated in a report of the UN Secretary General by Kofi Annan: *‘[b]ecause non-state armed groups may exercise de facto control over areas of territory where population groups are in urgent need of humanitarian assistance, negotiating humanitarian access with these armed groups has become integral to the work of humanitarian agencies.’*²⁹⁵

To sum up, especially because of these situations, the above-mentioned approach perceiving non-state actors as bound by relevant IHL norms through their position as subjects ‘sui generis’ seems to be the most realistic and acceptable one, although not being literally mentioned by the Geneva Convention and the APs. Once being bound by IHL rule applicable in NIACs, the non-state actors are also bound by the obligation to allow and facilitate humanitarian assistance subject to their consent, and the providers of the assistance need to sough the consent from both the State and the relevant non-state actors.

²⁹⁴ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 17.

²⁹⁵ Report of Secretary General on Children and Armed Conflicts. UN Doc S/2002/1299. 26 November 2002, para 17.

8. Facilitation of Humanitarian Assistance

8.1 Material Scope of Humanitarian Assistance

Regarding the material scope of humanitarian assistance, “*there is no generally accepted agreement regarding the extent of humanitarian assistance, that is, the range of items and services.*”²⁹⁶

When looking at relevant provisions of the Geneva Convention IV, the AP I, and the AP II, it is obvious that there are differences in the specifications of which items and services should be provided. However, as will be demonstrated, the lists of items and services given by these provisions are, usually, of a demonstrative character, not exhaustive.

Art 23 of the Geneva Convention IV mentions “*consignments of medical and hospital stores and objects necessary for religious worship*” which should be intended only for the civilians of another High Contracting Party. Regarding children under fifteen, expectant mothers and maternity cases, the list is more extensive; encompassing also essential foodstuff, clothing and tonics.

Nevertheless, Art 70 in connection with Art 69 of the AP I broadens this list and removes the distinction between children under fifteen, expectant mothers and maternity cases on one hand, and the rest of the civilian population on the other hand. Also, as was mentioned above, the list of items and services is more extensive, encompassing besides foodstuff and medical supplies also “*clothing, bedding, means of shelter, [and] other supplies essential to the survival of civilian population.*”²⁹⁷ It is important to add that according to the Rule 55 of the ICRC Study, this broadening is generally accepted, including by States which are not a party to the AP I.²⁹⁸

²⁹⁶ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 5.

²⁹⁷ Additional Protocol I (n 7) Art 69.

²⁹⁸ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

Regarding the occupied territories, there is no significant difference between the items and services listed by Art 59 of the Geneva Convention IV and Art 69 of the AP I which is given also by the fact that the lists of the provisions are of a demonstrative character both mentioning foodstuff, medical supplies and clothing for all the population of the occupied territory.

As far as the situations of NIACs are concerned, Art 18 of the AP II. speaks about *“supplies essential for its [the civilian population] survival, such as foodstuff and medical supplies.”*²⁹⁹

Thus, as can be noticed, the main emphasis is given on foodstuff, medical supplies, and clothes. However, due to the fact that the provisions (with the exception of Art 23 of the Geneva Convention[IV]) are not of an exhaustive character, the scope of the items and services which can be, potentially, provided by humanitarian assistance is much broader. Of course, nothing prevents the parties to the conflict from arranging an agreement which would extend the scope of the items. For example, in the situations of NIACs, also to those which go beyond the ‘mere’ survival of the civilian population. This was the case of the Memorandum of Understanding which was concluded between Iraq and the United Nations regarding the provision of humanitarian assistance to the Kurdish population. The assistance provided included, in addition, also agricultural rehabilitation and ‘any humanitarian measures geared to the speedy normalization of life’.³⁰⁰

With this being said, it is necessary to recall that for humanitarian assistance to remain humanitarian assistance, it has to stay in accordance with the principles of humanity, neutrality, and impartiality. Thus, also the items and services provided through the particular humanitarian action need to be in accordance with these principles. As the aim of humanitarian assistance is to bring the help to civilians, it is logical that the consignment has to correspond with the humanitarian purpose of the action. That is to say that consignments which would contain, for example, weapons or military equipment

²⁹⁹ Additional Protocol II (n 7).

³⁰⁰ Memorandum of Understanding between Iraq and the United Nations. 18 April 1991. UN Doc S/22513 (1991) 30 ILM 860.

would be in clear violation of the above mentioned principles and they could not be perceived as a ‘humanitarian assistance’.

8.2 Facilitation of Free Passage

Access to humanitarian assistance and the issue of free passage remain a significant challenge.³⁰¹ Even when the consent for a humanitarian action was formally granted, States (or armed groups) may use additional bureaucratic tactics to obstruct or complicate the delivery of humanitarian assistance.³⁰² In some instances the access of humanitarian organizations and the free passage of the aid is hampered by difficulties in obtaining visas or import authorizations for the consignment. When addressing the complicated situation of the providers of humanitarian assistance in Darfur in 2006, the OCHA in its statement on the issue pointed out especially the complex array of bureaucratic restrictions. The visa regime for humanitarian workers was complicated and lengthy (including the exit visas). Also, humanitarian workers were required to obtain permits for travels between states within Darfur and even a special permit to travel to particular areas within the states.³⁰³

Sometimes logistical issues occur; essential infrastructure has been destroyed or damaged making it difficult to reach the affected population.³⁰⁴ The ability of humanitarian agencies to carry out humanitarian assistance is often restricted by illegal checkpoints, roadblocks and extortion by local authorities and armed groups.³⁰⁵ In August 2008, the UN reported that there were at least 325 roadblocks through Somalia. Most of

³⁰¹ International Humanitarian Law and the Challenges of Contemporary Armed Conflicts. *ICRC*. 31th International Conference of the Red Cross and Red Crescent. Report. 28 November – 1 December 2011. Geneva. <<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>> accessed 21 June 2016.

³⁰² RYNGAERT, Cedric. Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective (n 252).

³⁰³ BARBER, Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law (n 266) p 8.

³⁰⁴ International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (n 301).

³⁰⁵ Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law (n 266) p 9.

them were installed by local armed groups or clan militia and almost all of them demanded a payment of fees for granting of free passage.³⁰⁶

8.2.1 International Armed Conflicts

According to Art 23 of the Geneva Convention IV, “[e]ach High Contracting Party shall allow the free passage” of the items enlisted in the provision. Nevertheless, the impact of the first paragraph of the article is significantly reduced by “*the safeguards for the benefit of the blocking party... that aim to ensure the consignments are only used for the identified humanitarian purposes.*”³⁰⁷ Therefore, States are not required to allow the free passage of the consignments if there are “*serious reasons for fearing:*

- (a) *that the consignments may be diverted from their destination,*
- (b) *that the control may not be effective, or*
- (c) *that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.*”³⁰⁸

However, Art 23 of the Geneva Convention IV needs to be read in the light of Art 70 of the AP I.³⁰⁹ According to the second paragraph of this provision “*The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section [Section II.: Relief in Favour of the Civilian Population], even if such assistance is destined for the civilian population of the adverse party.*” Art 68 of the AP I specifically notes that the provisions of the AP I with regard to humanitarian

³⁰⁶ Fatal Insecurity: Attacks on Aid Workers and Right Defenders in Somalia. *Amnesty International*. AI Index AFR 52/016/2008, p 17. <<https://www.amnesty.org/en/documents/afr52/016/2008/en/>> accessed 21 June 2016.

³⁰⁷ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 8.

³⁰⁸ Fourth Geneva Convention (n 6) Art 23.

³⁰⁹ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 9; *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 858.

assistance are supplementary to Art 23 of the Geneva Convention IV. Thus, the AP I removes the exceptions to the obligation of free passage contained in Art 23 and other relevant provisions of the Geneva Convention.³¹⁰ This clearly indicates that “*the rules contained in the AP I on this issue develop the rules in the Geneva Convention by extending the protections in the latter and removing the restrictions on those protections.*”³¹¹ On the other hand, the AP I establishes the rights of the concerned parties to require certain guarantees to balance the obligation to allow and facilitate free passage.³¹² Before moving to these guarantees, it is necessary to note that according to the Rule 55 of the ICRC Study, the obligation to allow rapid and unimpeded passage of humanitarian assistance is a part of the international customary law.³¹³ Thus, it is binding even for those States which have not ratified the AP I.

The obligation to ‘allow’ humanitarian assistance is not limited merely to a passive attitude. Meaning, that it does require from the High Contracting Parties more than a restraint from creating obstacles.³¹⁴ It entails also an obligation to actively facilitate humanitarian assistance. Thus, the parties are obliged to take positive action in order to facilitate transport and distribution of humanitarian consignments.³¹⁵ Similarly, the High Contracting Parties are obliged to avoid any harassment, to reduce formalities as far as possible and dispense with any that are superfluous.³¹⁶ On the other hand, although the High Contracting Parties must do all they can to facilitate the passage of humanitarian assistance, no one is expected to do impossible. It is always necessary to take into account the individual situation and conditions.³¹⁷

As was mentioned above, the AP I provides the relevant States with the right to require certain guarantees. First, Art 70 of the AP I provides them with the right “to

³¹⁰ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 863.

³¹¹ GILLARD, Emanuela-Chiara. *The Law Regulation Cross Border Relief Operation* (n 128) p 9.

³¹² *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 859.

³¹³ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

³¹⁴ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 37.

³¹⁵ *Ibid.*

³¹⁶ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 859.

³¹⁷ *Ibid.*

prescribe the technical arrangements, including search, under which such passage is permitted.” It is only logical that the relevant State should have the right to actually check, whether the consignment which was labelled as ‘humanitarian’ truly has such character and does not contain, for example, weapons or military equipment.

Secondly, the relevant State may insist that the distribution of the humanitarian assistance will be made under the local supervision of a Protecting Power.³¹⁸ According to Art 2 of the API and the ICRC Study, “[a] *Protecting Power is a neutral State or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the enemy Party and has agreed to carry out the functions assigned to a Protecting Power under international humanitarian law.*”³¹⁹ In the reality the institute of Protecting Power has not been used in practice for many years. Instead, “*the International Committee of the Red Cross has come to be recognized as a substitute for the Protecting Power.*”³²⁰ The Commentary to the APs emphasized the importance of this right to demand reliable supervision stating that it is of paramount importance especially “*as the range of relief consignments permitted is far broader than it was under the provisions of the Fourth Convention. In fact, if relief, such as, for example, foodstuffs or tents, were to end up in the hands of the armed forces, the relief action would undoubtedly increase the military potential of the receiving Party and would be obviously unacceptable to the adverse Party which had allowed the passage of these goods.*”³²¹

Thirdly, the humanitarian consignment cannot be diverted from the purpose for which it was intended and its forwarding cannot be delayed with the exception of cases of urgent necessity in the interest of the civilian population concerned.³²² According to the Commentary to the APs, the case of urgent necessity means that it must be virtually impossible to do otherwise.³²³ A delay could be acceptable, for example, due to security reasons; when it would be too dangerous to enter the particular territory.

³¹⁸ Additional Protocol I (n 7) Art 70(3)(b).

³¹⁹ How Does Law Protect in War? Glossary. Protecting Power. ICRC. 29 May 2012.

<<https://www.icrc.org/casebook/doc/glossary/protecting-powers-glossary.htm>> accessed 21 June 2016.

³²⁰ Ibid.

³²¹ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 860.

³²² Additional Protocol I (n 7) Art 70(3)(c).

³²³ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949*

8.2.1.1 Occupied Territories

Regarding the situation of occupied territories, the obligation of the occupying authorities to facilitate humanitarian assistance is, under Art 59 of the Geneva Convention IV, unconditional.³²⁴

Also, the obligation to authorize the free passage of the consignments is accompanied by the obligation to guarantee their protection. Thus, for example, a mere lift of a blockade and a refrain from attacking or confiscating the humanitarian consignments would not be sufficient. The relevant High Contracting Parties have to actively pursue the protection and unimpeded facilitation of the humanitarian assistance.³²⁵ The Occupying Power is forbidden to divert the consignments from the purpose for which they are intended; with the exception of the cases of urgent necessity.³²⁶ Also, the consignments “*shall be exempt in occupied territory from all charges, taxes, or custom duties unless these are necessary in the interest of the economy of the territory.*”³²⁷

However, similarly to the case of Art 70 of the AP I in the context of non-occupied territories, the Geneva Convention IV provides the occupying authorities with certain control rights. Under Art 59 of the Convention, the Power granting free passage to consignments on their way to territory occupied by an adverse Party to the conflict has the right to search the consignments, to regulate their passage according to prescribed times and routes, and to be reasonably satisfied through the Protecting Power that these consignments will be used for the benefit of the needy population, not the Occupying Power.³²⁸ According to Pictet, such a satisfactory supervision might entail, for example, that the relief supplies must reach the people for whom they are intended and that every

(n 127) p 862.

³²⁴ International Legal Frameworks for Humanitarian Action. *GSDRC*. Topic Guide. Birmingham: University of Birmingham, 2013, p 7.

³²⁵ Treaties, State Parties and Commentaries: Fourth Geneva Convention of 1949. Commentary. *ICRC*. <<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15B5740DF2203BE4C12563CD0042C966>> accessed 21 June 2016.

³²⁶ Fourth Geneva Convention (n 6) Art 60.

³²⁷ Fourth Geneva Convention (n 6) Art 61.

³²⁸ Fourth Geneva Convention (n 6) Art 59.

precaution must be taken to ensure that the recipients do not place them on the black markets (e.g.: frequent spot checking in storehouse, constant surveillance of the distribution or verification of the reports drawn up by the distributing bodies).³²⁹

8.2.2 Non-International Armed Conflicts

Contrary to the Geneva Convention IV and the AP I, the provisions of the AP II do not specifically contain the obligation to allow and facilitate passage of humanitarian assistance and access to it. It is worth to mention that such an obligation was included in the draft version of the protocol adopted by Committee II of the Diplomatic Conference which led the adoption of the Additional Protocols. However, it was deleted at the last moment as a part of the package aimed at the adoption of a simplified text.³³⁰ Thus, as far as only the treaty law is concerned, there is no such obligation literary mentioned in the text of the AP II. There are scholars who claim that it can be argued that the obligation can be derived from the spirit of Art 18 of the AP II.³³¹ This approach is also supported by the Commentary to the AP II which simply, without any further elaboration, notes that “[o]nce relief actions are accepted in principle, the authorities are under obligation to co-operate, in particular by facilitation the rapid transit of relief consignments and by ensuring the safety of the convoy.”³³²

As far as the customary law is concerned, according to the ICRC Study and some scholars, there is enough state practice and opinion juris to support the claim that there is an obligation to facilitate free passage and rapid distribution of humanitarian assistance which emerged as a norm of customary international law.³³³ According to the ICRC, the obligation to allow the free passage of relief supplies is set forth in numerous military manuals which are applicable in non-international armed conflicts, it is also supported by

³²⁹ PICTET, Jean. *Commentary on the Geneva Conventions of 12 August 1949*. Geneva: ICRC, 1958, p 325.

³³⁰ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

³³¹ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 38.

³³² *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 10.

³³³ YNGAERT, Cedric. Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective (n 252); Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

many official statements and other practice relating to non-international armed conflicts, and the contrary practice has generally been condemned with respect to both international and non-international armed conflict.³³⁴ The ICRC mentions, as an example, the Mengistu regime in Ethiopia. The regime reportedly used the denial of access to food as a weapon against armed opposition groups, including by banning the movement of relief supplies after a famine emerged in late 1989. However, there was a strong international criticism of this policy and Mengistu reversed his decision. There are also numerous condemning statements made by the UN Security Council, which has called on the parties to numerous conflicts, such as those in Afghanistan, Angola, between Armenia and Azerbaijan, Bosnia and Herzegovina, Burundi, Democratic Republic of the Congo, Georgia, Kosovo, Liberia, Somalia and Yemen to provide unimpeded access for humanitarian assistance.³³⁵ Nevertheless, it should be noted that there are scholars who still question whether there the state practice is truly strong enough to create the obligation to free passage also under international customary law.³³⁶

8.3 Obligations of Third States

The cooperation of third States is essential for successful transit and delivery of humanitarian consignments. In many cases the access to the civilian population in need is possible only through the territory of another State.³³⁷ Therefore, a guarantee of free passage granted only by the receiving party would not be sufficient.

According to Art 23 of the Geneva Convention IV, “[e]ach High Contracting Party shall allow the free passage of all consignments...”³³⁸ By using the phrase ‘each High Contracting Party’ the provision addresses not only the parties to the conflict, but also other High Contracting Parties to the Convention. Thus, it imposes the obligation to allow free passage also upon all relevant third States.³³⁹ The obligations of third States in the context of occupied territories are regulated in the same way. According to Art 59 of

³³⁴ Ibid.

³³⁵ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

³³⁶ SPIEKER, Heike. The Right to Give and Receive Humanitarian Assistance (n 10).

³³⁷ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 38.

³³⁸ Fourth Geneva Convention (n 6).

³³⁹ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 38.

the Geneva Convention IV, “[a]ll Contracting Parties shall permit the free passage of these [for the civilian population of the occupied territory intended] consignments and shall guarantee their protection.”

Similarly, Art 70 of the AP I, which supplements the relevant provisions of the Geneva Convention IV, explicitly highlights the obligation of third states stating that “[t]he Parties to the conflict and each High Contracting Party concerned shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section...”³⁴⁰ It should be noted that as in the case of the parties to the conflict, the third states obligation to allow the free passage of humanitarian assistance is accompanied by the obligation to guarantee its protection.³⁴¹ Also, as the parties to the conflict, the third States allowing the humanitarian assistance to pass through their territory have the rights according to Art 70 para 3. These encompass, for example, the right to search the consignments, prescribe technical arrangements, and request the supervision of a Protecting Power or its substitute.

Regarding NIACs, the AP II does not expressly address the obligations of third states in the context of free passage and facilitation of humanitarian assistance. There was a provision in the draft of the AP II containing such an obligation, however it was deleted before the adoption of the protocol in order to simplify its text.³⁴² Thus, Art 18 of the AP II does not contain any provision addressing third states. Theoretically, it could be possible to use the same approach, using the ‘spirit of the Art 18’ argument, as in the case of the obligation to allow and facilitate the free passage. However, interestingly, it seems that, contrary to the above-mentioned obligation of the parties to the conflict, there is not enough support among the doctrine to actually make such a claim. Majority of the available literature as well as the Commentary to the AP II simply avoid the issue.

As far as customary international law is concerned, the ICRC Study does not declare that there is such an obligation created as a part of customary international law.³⁴³

³⁴⁰ Additional Protocol I (n 7) Art 70 para 2.

³⁴¹ Treaties, State Parties and Commentaries: Fourth Geneva Convention of 1949. Commentary. ICRC. (n 325) Art 59.

³⁴² Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

³⁴³ Ibid.

It refers to some instances when the UN SC called upon the neighbouring states to help with the transfer and facilitation of humanitarian assistance. For example, in 1994, the UN SC called upon the neighbouring states of Rwanda to facilitate the goods and supplies to meet the needs of the displaced persons within Rwanda.³⁴⁴ The ICRC Study also mentions the Guiding Principles on Humanitarian Assistance ('the Guiding Principles') adopted by the UN General Assembly in 1991 which emphasize that "*States in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance.*"³⁴⁵ Here, it is important to notice the choice of the words as the Guiding Principles states that States are '*urged*' to participate, not '*obliged*'. The Guiding Principles as well as the above-mentioned UN SC resolution calls upon the third States, urge them. Nevertheless, they do not state that the third States actually have the obligation to do so.

8.4 Protection of Humanitarian Personnel

There has been a raising concern regarding the safety and protection of humanitarian personnel during the last three decades. The job of humanitarian personnel has never been considered an easy one, however, it has become particularly dangerous since the 90's. For example, regarding the UN personnel, during the years 1973 – 1991 approximately 20 UN staff members in total were killed in the course of carrying out their duties. In 2008 there were 146 incidents directly involving humanitarian personnel only in Somalia which led to 36 humanitarian staff being killed and 17 injured.³⁴⁶ According to OCHA, more humanitarian workers were attacked in 2013 than in any years since 1997 when the record keeping began.³⁴⁷ In 2013 around 340 aid workers were attacked and 119 killed. The year before, in 2012, it was 276 attacked humanitarian workers, of whom 69

³⁴⁴ UN Security Council, Statement of the President of the UN SC. UN Doc S/PRST/1994/21. 30 April 1994.

³⁴⁵ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (n 9).

³⁴⁶ BARBER, Rebecca. *Facilitating International Assistance in International Humanitarian and Human Rights Law* (n 266) p 9.

³⁴⁷ Annual Report 2013. OCHA. 2014, p 3. <<http://www.unocha.org/node/68394>> accessed 21 June 2016.

were killed.³⁴⁸ In June 2015, nine Afghan employees of the Czech NGO People in Need were attacked and deliberately killed by an unidentified gunman in Northern Afghanistan.

However, it cannot be said that the above-mentioned alarming development has its roots in the lack of protection of humanitarian personnel as far as IHL is concerned. Protection of civilians and humanitarian personnel is strongly enshrined in IHL. The ICRC goes even as far as describing the protection of civilians during armed conflicts as a cornerstone of IHL.³⁴⁹ The main problem, in this case, is not the law, but the lack of respect for it. *“The protection of civilians provided by the Geneva Conventions and Additional Protocols is extensive. The problem of the past 50 years has been the application. Neither States nor non-State armed groups have respected their obligations adequately.”*³⁵⁰

On the general level, civilian personnel involved in humanitarian assistance are subject to the general protections applicable to civilians of states not party to the conflict.³⁵¹ Nevertheless, IHL grants the humanitarian relief personnel also with additional protection in both IACs and NIACs.

Regarding the IACs, the Geneva Convention IV does not contain a provision which would expressly grant the humanitarian relief personnel a special protection. However, according to the Commentary, the obligation to allow free passage of relief consignments to and within the occupied territories under Art 59 *“is accompanied by the obligation to guarantee their protection.... all the States concerned must respect the consignments and protect them when they are exposed to danger through military operations.”*³⁵² The Geneva Convention IV was further supplemented by the AP I. Art 71 of the AP I provides:

³⁴⁸ Ibid.

³⁴⁹ Civilians protected under international humanitarian law. ICRC. 29 October 2010. <<https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm>> accessed 21 June 2016.

³⁵⁰ Ibid.

³⁵¹ Customary International Law. Database. Rule 31. *International Committee of the Red Cross* (n 83).

³⁵² Treaties, State Parties and Commentaries: Fourth Geneva Convention of 1949. Commentary. ICRC. (n 325) Art 59.

- “1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.*
- 2. Such personnel shall be respected and protected.”*³⁵³

The obligation to protect and respect the humanitarian relief personnel stated in para 2 of the provision applies to all Parties to the conflict.³⁵⁴ According to the Commentary to the AP I, one of the components of the above-mentioned obligation is, for example, the obligation of the Parties to the conflict to inform and instruct their armed forces not to attack the humanitarian relief personnel.³⁵⁵

In this context, the Commentary to the AP I also highlights the importance and usefulness of the protective Red Cross, Red Crescent, and Red Crystal emblems.³⁵⁶ The purpose of these emblems is to serve as an identification and protection of humanitarian objects such as hospitals, medical transports, and also the convoys with humanitarian assistance and humanitarian relief personnel. The use of the protective emblems is governed by the Geneva Conventions and the APs.³⁵⁷ However, not all providers of humanitarian assistance are in the position to display the protective emblems. Only the ICRC, the International Federation of Red Cross and Red Crescent Societies, National Red Cross and Red Crescent Societies, and in certain situations also by the medical services of armed forces, military chaplains and civilian hospitals in the situations of armed conflict, are authorized to use them.³⁵⁸

Regarding the NIACs, contrary to the AP I, the AP II does not contain a specific

³⁵³ Additional Protocol I (n 7).

³⁵⁴ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 870.

³⁵⁵ *Ibid.*

³⁵⁶ The Red Lion and Sun is also recognized as a protective emblem, but no longer in use.

³⁵⁷ First Geneva Convention Art 38, 44, 53; Second Geneva Convention Art 41-45; Fourth Geneva Convention Art 18 and 20; Additional Protocol II Art 18, 37, 38, 85; Additional Protocol II Art 12; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)*, 8 December 2005.

³⁵⁸ The protection of the red cross, red crescent and red crystal emblems – Factsheet. *ICRC*. 25 March 2014. <<https://www.icrc.org/en/document/protection-red-cross-red-crescent-and-red-crystal-emblems-factsheet>> accessed 21 June 2016.

provision dealing with the protection of humanitarian relief personnel. Nevertheless, according to the ICRC Study “*This rule [the obligation to protect humanitarian relief personnel] is indispensable... if relief actions for civilian populations in need are to succeed.*”³⁵⁹

Although the treaty law does not provide specific or elaborated provisions confirming the obligation to respect and protect the humanitarian relief personnel during the NIACs, there is a strong foundation of such an obligation in customary international law regarding both IACs and NIACs.³⁶⁰

The rule 31 of the ICRC Study clearly states that “[h]umanitarian relief personnel has to be protected and respected”.³⁶¹ According to the study, “[s]tate practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The safety and security of humanitarian relief personnel is an indispensable condition for the delivery of humanitarian relief to civilian populations in need threatened with starvation.”³⁶² The study also refers to numerous cases confirming the state practice.³⁶³ It can be said that virtually every attack against humanitarian relief personnel meets with a strong condemnation by the international community and actors. There is a long list of UN SC resolutions condemning attacks against humanitarian relief personnel no matter the type of conflicts.³⁶⁴ For example, in a resolution adopted in 2003 on the ‘Protection of United Nations personnel, associated personnel and humanitarian personnel in conflict zones’, the UN SC unanimously expressed “its strong condemnation of all forms of violence, including, inter alia, murder, rape and sexual assault, intimidation, armed robbery, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed, as well as attacks on humanitarian convoys and acts of destruction and looting of their property.”³⁶⁵ Similarly, in a resolution

³⁵⁹ Customary International Law. Database. Rule 31. *International Committee of the Red Cross* (n 83).

³⁶⁰ *Ibid.*

³⁶¹ *Ibid.*

³⁶² *Ibid.*

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

³⁶⁵ UN SC Resolution. UN Doc S/RES/1502. 25 August 2003, voting record 15-0-0.

adopted in 2006 on the situation in Georgia, the UN Security Council underlined “*that it is the primary responsibility of both sides to provide appropriate security and to ensure the freedom of movement of UNOMIG, the CIS peacekeeping force and other international personnel*” and called ‘*on both sides to fulfil their obligations in this regard.*’³⁶⁶

It should be noted that deliberate attacking of humanitarian relief personnel is considered to be a war crime, under the Rome Statute of the ICC. Pursuant to Art 8(2)(b)(iii) and (e)(iii), “[i]ntentionally directing attacks against personnel ... involved in a humanitarian assistance ... mission ... as long as they are entitled to the protection given to civilians ... under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.³⁶⁷

To sum up, it is clear that the protection of humanitarian relief personnel is at the centre of attention of IHL which, at least on the theoretical level, provides humanitarian relief personnel with a strong and, as far as they act in accordance with their position, unconditional protection. Unfortunately, as was mentioned at the beginning of this sub-chapter, the reality in the field does not reflect the legal framework as hundreds of humanitarian workers are attacked every year.

³⁶⁶ UN SC Resolution. UN Doc S/Res/1666. 31 March 2016, para 8, voting records 15-0-0.

³⁶⁷ *Rome Statute of the International Criminal Court (last amended 2010)* (n 58).

9. Conclusion

As was stated in the introduction to this thesis, there are thousands of people seeking humanitarian assistance around the world and there are also thousands of those who are trying to provide them with it. Unfortunately, both sides face serious obstacles. These obstacles have their roots in different reasons.

Some of them are caused by the imperfect legal framework governing humanitarian assistance in situations of armed conflicts. As was demonstrated, the majority of problems with the interpretation or application of various legal rules is connected with NIACs as the legal framework dealing with them is not so rich as the one dedicated to IACs. There are many issues missing in the treaty law governing NIACs. In order to make the AP II acceptable for as many States as possible, numerous important provision were deleted from the draft version leaving issues like facilitation and its exact conditions unanswered. Of course, it can be argued that those can be governed by customary IHL. To put in another words; if there is a need for more rules or more exact rules, they can be always created through state practice and *opinio juris*. Unfortunately, as was also discussed in this thesis, the customary character of numerous IHL rules is disputable and it is not a simply task to determine which rules can be perceived as customary and which not. Moreover, it is easier for a State to dispute the existence of a legal rule, when it exists only as a part of the customary IHL. Once written and ratified treaty provision cannot be questioned so easily.

One of the most problematic, on the theoretical and also practical level, is the issue of consent. Once again, the legal framework, while creating the obligation to seek consent for humanitarian assistance from parties to the conflict, does not specify in a great detail under which circumstances can be such consent denied. There are no details provided by the treaty law. There are, presumably, some more specific rules which has emerged through customary IHL. However, those are still not specific enough. Although it is generally accepted that the denial of consent cannot be arbitrary, the exact meaning of 'arbitrary' is unclear. Moreover, there are also disputes regarding from whom the consent should be sought in NIACs.

Although problematic, there is a positive aspect of those kind of problems which are related to the imperfections of the legal framework: they can be fixed through an adoption of new legal instruments or through creating of new and strong IHL customary rules; under the condition that there is a political will to do so. However, there are also situations when the problem is not caused by the mere legal rules, but by the lack of respect towards them.

In some cases, the already existing rules are abused by the parties to the armed conflict. For example, when allowing humanitarian assistance to be delivered to a certain area, the parties are obliged to ensure its protection. However, sometimes this obligation is used as an excuse for refusing the providers of humanitarian assistance to enter particular area; based on the argument that it is too dangerous.³⁶⁸

Some provisions regarding humanitarian assistance are simply not respected enough. As discussed in Chapter VIII., IHL provides humanitarian relief personnel and convoys with a strong protection. Still, these provisions are one of the most violated. Similarly, parties to the conflict should allow free and unimpeded passage of humanitarian assistance. In reality, the providers have to pay fees and bribe to cross various roadblocks and “checkpoints”. The ways how to “fix” these problems are more connected with the issue of enforcement of IHL and consequences of its violations. Unfortunately, although being highly interesting, the scope of this thesis was too limited to deal with such complex issues. However, it would be a great topic for another thesis or dissertation.

Finally, there are also some basic misunderstandings regarding the character of humanitarian assistance among the public and sometimes even among the parties to the conflict. As mentioned in Chapter VI., the concept of humanitarian assistance under IHL is based on principles of humanity, impartiality, and neutrality, and it also has to be facilitated in such way. Nevertheless, providers of humanitarian assistance sometimes face criticism for helping the “wrong” people, meaning the people who are by some part

³⁶⁸ Syria Aid Convoy Denied Access to Baba Amro. *Reuters*. 3 March 2012.

<<http://www.reuters.com/article/us-syria-redcross-idUSTRE8220L920120303>> accessed 21 June 2016.

of the public perceived as morally “bad”. These situations can be prevented only by education on the topic and by raising the awareness about IHL and humanitarian assistance.

Going once again back to the introduction part of this thesis, the history of the human effort to help those suffering in violent conflicts and wars is probably as old as the wars and violent conflicts themselves. As long as humanity will fight, there will be people trying to help the victims and there will be also parties to the conflicts trying to prevent any negative consequences which such help could have for their interests. The IHL has to and needs to balance all these interests which is not an easy and uncomplicated task. The current legal framework governing humanitarian assistance in armed conflicts mirrors this. There is certainly a way to bring more legal certainty into the already existing rules and there is also a space for new ones. There is also definitely a space for more respect towards IHL. On the other hand, the progress which has been made in this field during the last hundred years is remarkable. Hopefully, there is a similar one ahead of us.

Resumé

Diplomová práce se zabývá problematikou humanitární pomoci tak, jak je upravena normami platného mezinárodního humanitárního práva.

Pojem humanitární pomoc

Jelikož v rámci platných právních instrumentů mezinárodního práva i v rámci doktríny samotné neexistuje jednotná definice pojmu „humanitární pomoc“, bylo nejdříve nezbytné tento pojem, pro účely této diplomové práce, vymezit.

Pro účely této práce bylo stanoveno, že pod pojem humanitární pomoc nebudou spadat následující instituty: rozvojová pomoc, pomoc v situacích živelných pohrom a jiných katastrof a humanitární intervence. Rozvojová pomoc byla vyloučena z toho důvodu, že jejím primárním cílem není poskytování pomoci obětem ozbrojených konfliktů, nýbrž, jak již název sám napovídá, dlouhodobý ekonomický, sociální a politický rozvoj.³⁶⁹ Pomoc poskytovaná v situacích živelných pohrom a jiných katastrof je pro účely této práce tématem příliš širokým, neboť mimo ozbrojené konflikty zahrnuje i řadu dalších událostí. Koncept humanitární intervence byl taktéž odlišen od pojmu „humanitární pomoc“, a to z toho důvodu, že dle většiny doktríny v sobě zahrnuje prvek donucení v podobě hrozby silou či užití síly a nevyžaduje souhlas dotčeného státu³⁷⁰. Takovýto přístup je ovšem v rozporu s tím, jak institut humanitární pomoci vnímají Ženevské úmluvy či různí mezinárodní aktéři.³⁷¹ Za „humanitární pomoc“, pro účely této diplomové práce, tak byly označeny takové akce, jejichž cílem je poskytnutí základních a nezbytných zásob a služeb civilnímu obyvatelstvu, které se nachází v situaci ozbrojeného konfliktu, a to ať již vnitrostátními nebo zahraničními aktéry. Zároveň bylo určeno, že přestože hlavním pojmem používaným pro účely této práce bude pojem

³⁶⁹ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 5.

³⁷⁰ Sandvik-Nylund (n 4) p 6.

³⁷¹ UN GA Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations (n 9) para 3; First Geneva Convention, Second Geneva Convention and Third Geneva Convention (n 6).

„humanitární pomoc“, termíny jako „humanitární akce“ či „pomocné akce“³⁷² budou také využívány, a to jakožto synonyma.

Představená definice má svá omezení, jichž si je autorka plně vědoma. Ty jsou dány především limitem práce samotné, neboť vzhledem k jejímu omezenému rozsahu není možné zkoumat všechny existující způsoby, na základě kterých lze k pojmu „humanitární pomoc“ přistoupit. Bylo tedy zapotřebí zvolit jeden a zbylé vyloučit.

Relevantní právní prameny

Hlavními právními prameny, které upravují institut humanitární pomoci v rámci mezinárodního humanitárního práva (dále jen „MHP“), jsou Čtvrtá ženevská úmluva z roku 1949 – Úmluva o ochraně civilních osob za války (dále jen „Čtvrtá ženevská úmluva“), Dodatkový protokol I a Dodatkový protokol II.³⁷³

Nejdříve je nicméně zapotřebí stručně představit Haagskou úmluvu o zákonech a obyčejích pozemní války,³⁷⁴ která byla přijata na první Haagské mírové konferenci v roce 1899. Tato úmluva je důležitou z toho důvodu, že byla prvním mezinárodním právně závazným instrumentem, který, byť jen ve velmi obecné rovině, obsahoval pravidla týkající se postavení civilních osob a zacházení s nimi za války. Úmluva z roku 1899 byla s mírnými změnami revidována v roce 1907 na druhé Haagské mírové konferenci. Byť od přijetí těchto dokumentů uplynulo více než sto let, některé jejich části jsou nadále platnou součástí humanitárního práva, neboť jsou vyjádřením mezinárodního obyčejového práva.³⁷⁵

Byla to nicméně až výše uvedená Čtvrtá ženevská úmluva z roku 1949, která byla

³⁷² V anglickém originálním znění „humanitarian actions, „relief actions“ nebo „humanitarian relief“.

³⁷³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 60.

³⁷⁴ *Hague Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 29 July 1889.

³⁷⁵ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo*. Praha: C.H. Beck, 2010, p 100.

prvním mezinárodním smluvním instrumentem věnovaným výhradně otázce postavení, práv a ochrany civilistů v rámci ozbrojených konfliktů. Všechny čtyři ženevské úmluvy z roku 1949 byly následně roku 1977 doplněny o dva dodatkové protokoly. Tedy, o Dodatkový protokol I., který řeší právní úpravu mezinárodních ozbrojených konfliktů, a Dodatkový protokol II., který se věnuje problematice konfliktů vnitrostátních. Před přijetím Dodatkového protokolu II. upravoval, v rámci smluvního práva, situace vnitrostátních konfliktů pouze společný čl. 3 Ženevských úmluv z roku 1949.

Závěrem je nezbytné zmínit i Římský statut Mezinárodního trestního soudu (dále jen „Římský status“),³⁷⁶ který byl přijat na mezinárodní diplomatické konferenci v Římě v roce 1998 a vstoupil v platnost 1. července 2002. Římský statut upravuje fungování a jurisdikci Mezinárodního trestního soudu (dále jen „MSD“) a zároveň stanovuje čtyři kategorie mezinárodních zločinů, které MSD může na základě individuální trestní odpovědnosti jednotlivců stíhat – zločin genocidia, válečné zločiny, zločiny proti lidskosti a zločin agrese. Římský status je pro problematiku humanitární pomoci důležitý z toho důvod, neboť dvě ze skutkových podstat, které zavádí, se dotýkají právě i humanitární pomoci. Čl. 8 odst. 2 písm. b) Římského statutu označuje úmyslné hladovění civilistů jakožto způsob vedení mezinárodních ozbrojených konfliktů za válečný zločin. Zde je nutné podotknout, že Římský státu neobsahuje obdobné pravidlo i pro situace vnitrostátních konfliktů. Dalším pro účely této práce relevantním válečným zločinem, jehož skutkovou podstatu Římský statut vymezuje, a to v čl. 8 odst. 2 písm. d), je úmyslné napadání pracovníků, jednotek, objektů či vozidel, kteří jsou součástí humanitární pomoci či operací na udržení míru.

Co se týče mezinárodního obyčejového práva, ke vzniku obyčejové právní normy jsou nezbytné dva faktory – praxe států (*usus*) a přesvědčení o právní závaznosti takového pravidla (*opinio juris*).³⁷⁷ U výše uvedených Ženevských úmluv panuje obecná shoda, že mají svůj odraz i v rámci mezinárodního obyčejového práva. Tedy, že

³⁷⁶ *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, 2187 U.N.T.S. 90.

³⁷⁷ HENCKAERTS, Jean-Marie. Study on Customary International Humanitarian Law. A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts. *International Review of the Red Cross*. March 2005. Vol. 87 No. 857 p 178.

normy obsažené v těchto úmluvách jsou i normami mezinárodního obyčejového práva.³⁷⁸ Obyčejový charakter norem obsažených v Dodatkovém protokolu I. a Dodatkovém protokolu II. je diskutabilní.³⁷⁹ Vzhledem k tomu, že určení toho, jaké normy jsou či nejsou normami obyčejového MHP, je poměrně komplikované, rozhodl se v roce 1997 Mezinárodní výbor Červeného kříže na toto téma vypracovat obsáhlou studii o obyčejovém mezinárodním humanitárním právu (dále jen „studie MVČK“).³⁸⁰ Ta spatřila světlo světa v roce 2005 a dělí se na dvě části – pravidla a k nim náležící praxi. Přestože se způsob vypracování studie i její závěry nevyhnuly kritice, například ze strany Spojených států amerických, je obecně považována za věrohodný a kvalitní, byť právně nezávazný, materiál. Je nicméně nutné brát ohled na to, že studie byla obecně kritizována především pro přílišnou progresivitu – tedy proto, že za mezinárodní obyčej označuje i taková pravidla, která dle jiných aktérů tohoto statusu ještě nedosáhla.³⁸¹

Stručná historie humanitární pomoci

Přestože základy moderního MHP byly položeny až v 19. století, kořeny humanitární pomoci jakožto snahy pomoci obětem válek či ozbrojených konfliktů sahají daleko hlouběji do historie – pravděpodobně stejně daleko jakožto existence násilných střetů samotných. Pravidla řídící tyto „akty pomoci“ byla ovšem jiného charakteru než dnes, neboť nebyla založena na mezinárodních smluvních či obyčejových právních normách, ale na náboženských pravidlech, popř. na tzv. kodexech cti, jimiž se bojovníci dané kultury měli řídit. Tato pravidla se měnila v závislosti na kultuře a časovém období a ne vždy přistupovala ke všem jednotlivcům stejně – například příslušníci jiné náboženské víry byli nezřídka v méně výhodném postavení.

Hlavním impulsem ke vzniku moderního MHP byla iniciativa švýcarského

³⁷⁸ The Geneva Conventions of 1949: origins and current significance. *ICRC*.

<<https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm>> accessed 20 June 2016.

³⁷⁹ Treaties, State Parties and Commentaries: Additional Protocol II to the Geneva Conventions (n 53).

³⁸⁰ Customary International Law. Database, *International Committee of the Red Cross*.

<<https://www.icrc.org/customary-ihl/eng/docs/home>> accessed 20 June 2016.

³⁸¹ BELLINGER, John; HAYNES, William. A US Government Response to the International Committee of the Red Cross Study *International Humanitarian Law*. *International Review of the Red Cross*. June 2007. Vol. 89 No. 866

obchodníka Henryho Dunanta, aktivisty a později také nositele první Nobelovy ceny míru. Ten se poté, co se stal svědkem následků bitvy u Solferina v červnu 1859, podílel jak na založení „Výboru Pěti“, z kterého následně vznikl dnešní Mezinárodní výbor Červeného kříže, tak na zorganizování diplomatické konference v roce 1864, která vedla k přijetí první Ženevské úmluvy, plným názvem Ženevské úmluvy o zlepšení osudu raněných a nemocných příslušníků ozbrojených sil v poli.³⁸² Je zapotřebí zmínit, že první mezinárodní úmluvy upravující humanitární právo přijaté po roce 1864 nevěnovaly postavení a ochraně civilistů, a tím pádem i otázce humanitární pomoci, příliš mnoho pozornosti.

První mezinárodní úmluvou věnovanou výhradně civilistům byla až Čtvrtá ženevská úmluva, Úmluva o ochraně civilních osob za války, která byla přijata v roce 1949. Politické mocnosti 19. století totiž operovaly s premisou, že války jsou bojovány vojáky a armádami a civilního obyvatelstva se tudíž tolik nedotýkají. První světová válka byla rychlým a nepříjemným probuzením z této představy. Bohužel, přijetí návrhu mezinárodní úmluvy zaměřené právě na ochranu civilistů, který v meziválečných letech předložil Mezinárodní výbor Červeného kříže, zabránil začátek II. světové války v roce 1939.³⁸³ Jedním z hlavních problémů, s kterými se civilní obyvatelstvo během obou světových válek potýkalo, byl právě nedostatek základní surovin a omezený přístup k humanitární pomoci – i z toho důvodu, že úmyslné hladovění civilního obyvatelstva jakožto způsobu vedení války nebylo v té době ještě zakázané.³⁸⁴ Stejně tak neexistovala všeobecně platná smluvní pravidla, která by poskytování humanitární pomoci civilnímu obyvatelstvu za války upravovala. Přijetí Čtvrté ženevské úmluvy v roce 1949 tak bylo zásadní a významnou změnou. Podrobnější úpravu, i v oblasti humanitární pomoci, pak přineslo přijetí výše zmíněných Dodatkových protokolů v roce 1977.

³⁸² *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (First Geneva Convention)* 22 August 1864.

³⁸³ MACALLISTER-SMITH, Peter. *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organizations* (n 96) p 12.

³⁸⁴ SPIEKER, Heike. *The Right to Give and Receive Humanitarian Assistance* (n 10).

Podmínky aplikace pravidel mezinárodního humanitárního práva upravujících poskytování humanitární pomoci

K tomu, aby bylo možné aplikovat ta pravidla MHP, která upravují otázku humanitární pomoci, na určitou konkrétní situaci, je zapotřebí splnění několika podmínek.

Zaprvé – musí se jednat o situaci ozbrojeného konfliktu. Humanitární pomoc, jak již bylo uvedeno výše, upravují pravidla MHP. Přestože existuje poměrně malá škála norem MHP, které se vztahují i na situace míru (např. povinnost šířit povědomí o MHP), pravidla dotýkající se otázky humanitární pomoci jsou aplikovatelná pouze během ozbrojených konfliktů.

Zadruhé se musí jednat o situaci, kdy primární aktér, ať již stát či nestátní aktér kontrolující danou oblast, není schopný dostatečnou humanitární pomoc poskytnout sám. Jak uvádí řada odborníků, komentář k Dodatkovému protokolu II. či například rezoluce Valného shromáždění OSN, subjektem majícím primární postavení při poskytování humanitární pomoci je sám dotčený stát.³⁸⁵ Role různých mezinárodních organizací, jiných států či neziskových organizací by měla být vnímána až jako subsidiární a doplňující primárního aktéra. Řečeno jinými slovy, v situaci, kdy je daný stát či nestátní aktér kontrolující dané území schopný humanitární situaci zvládnout sám, není zapotřebí, aby poskytování humanitární pomoci zajišťovaly jiné subjekty.

Třetí podmínkou pro aplikaci ustanovení MHP, která se věnují poskytování humanitární pomoci, je určitá míra „utrpení“ civilního obyvatelstva. Tato podmínka je založena na úvaze, že jedním z přirozených doprovodných jevů ozbrojených konfliktů je i negativní dopad na civilní obyvatelstvo. Ne vždy je však tento dopad tak intenzivní a zásadní, aby vyžadoval zorganizování humanitární operace. Každý z příslušných instrumentů MHP nastavuje „laťku“ různě vysoko. Nejníže ji pokládá čl. 59 Čtvrté

³⁸⁵GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation. *International Review of the Red Cross*. 2013 Vol. 95. Issue 890 p. 356; SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 15-25; BARBER, Rebecca. Facilitating International Assistance in International Humanitarian and Human Rights Law. *International Review of the Red Cross*. June 2009. Vol. 91. No. 874. p 18-19.

ženevské úmluvy pro situaci okupovaných území, který stanoví, že pomocné akce mají být podniknuty v případě, kdy je obyvatelstvo obsazeného území nebo jeho části „nedostatečně zásobováno“.³⁸⁶ Podobný požadavek stanoví i čl. 70 Dodatkového protokolu I. pro situace mimo okupovaná území. Nejvýše výslovnou „laťku“ nastavuje čl. 18 Dodatkového protokolu II. pro situace vnitrostátních konfliktů, který stanoví, že obyvatelstvo musí trpět „nadměrnou nouzí v důsledku nedostatku zásob nutných k jeho přežití“.³⁸⁷

Příjemci a poskytovatelé humanitární pomoci

Cílem humanitární pomoci je poskytnout pomoc trpícímu civilnímu obyvatelstvu. Pro tento účel je ovšem nezbytné stanovit přesný význam slova „civilista“ a „civilní obyvatelstvo“. Ženevská úmluva, přestože termíny „civilista“ či „civilní obyvatelstvo“ používá, definici těchto pojmů neobsahuje. Příslušnou definici lze nicméně nalézt v čl. 50 Dodatkového protokolu I., který za civilisty označuje ty osoby, které nejsou kombantanty. Pravidlo č. 5 studie MVČK přistupuje k vymezení civilistů stejně.³⁸⁸ V případech, kdy panují pochybnosti o statusu určité osoby, platí presumpce jejího civilního statusu - tedy až do prokázání opaku je nutné ji považovat za civilistu a také s ní jako s civilistou zacházet. Co se týče vnitrostátních konfliktů, Dodatkový protokol II., oproti Dodatkovému protokolu I., neobsahuje definici civilisty či civilních osob. Původní návrh protokolu takovouto definici obsahoval, avšak ta byla společně s dalšími ustanoveními vymazána ještě před přijetím dokumentu za účelem jeho zjednodušení a zkrácení. Chybějící definice je v tomto případě závažným opomenutím, neboť právě ve vnitrostátních konfliktech je hranice mezi civilisty a osobami náležícími k ozbrojeným silám méně ostrá. Zajímavé je, že komentář k Dodatkovému protokolu II. chybějící definici přechází a přímo uvádí, že civilním obyvatelstvem jsou myšleny všechny osoby, které se nepodílejí na nepřátelských akcích.³⁸⁹ Co se týče obyčejového MHP, pravidlo

³⁸⁶ Fourth Geneva Convention (n 6).

³⁸⁷ Additional Protocol II (n 7).

³⁸⁸ Customary International Law. Database. Rule 5 (n 151).

³⁸⁹ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 1515.

č. 5 studie MVČK se dle této studie vztahuje bez rozlišení na mezinárodní i vnitrostátní konflikty.

Mezi hlavní skupiny poskytovatelů humanitární pomoci patří následující – státy, mezinárodní organizace, MVČK a s ním spřízněné organizace a neziskové organizace (dále jen „NGOs“). Státy patří obecně mezi jedny z nejaktivnějších poskytovatelů humanitární pomoci, a to přestože bližší pohled do Čtvrté ženevské úmluvy i Dodatkových protokolů napoví, že s nimi tyto dokumenty v této roli nepočítaly, neboť je ve spojitosti s ní neuvádějí – s výjimkou okupovaných území. Mezinárodní organizace jsou rovněž aktivními přispěvateli, a to ať již univerzální – v této kategorii je nejaktivnější OSN, nebo regionální. Jejich hlavní výhodou je to, že oproti státům jim hrozí menší podezření z toho, že by se mohly prostřednictvím humanitární pomoci snažit prosazovat své politické či vojenské zájmy. Na druhou stranu, schválení humanitární pomoci většinou vyžaduje podporu většiny členů organizace a ne vždy se pro její zorganizování najde dostatečná podpora. MVČK, Mezinárodní federace Červeného kříže a Červeného půlměsíce a národní společnosti Červeného kříže a Červeného měsíce mají v rámci MHP i v souvislosti s poskytováním humanitární pomoci tradiční a všeobecně respektovanou roli. Čtvrtá ženevská úmluva i Dodatkové protokoly je zároveň často uvádí jako názorný příklad organizací, které mohou za daných podmínek humanitární pomoc poskytovat. Kromě již uvedených mohou poskytovat humanitární pomoci i jiné organizace, zpravidla neziskové a nevládní, tedy tzv. NGOs. Jak již bylo uvedeno, příslušné právní instrumenty jejich zapojení nevylučují. Mezi nejznámější organizace tohoto typu patří například Lékaři bez hranic nebo OXFAM.

Povaha humanitární pomoci

Aby bylo možné pomoc poskytovanou v rámci ozbrojeného konfliktu považovat za pomoc humanitární tak, jak ji chápe tato práce, musí naplňovat určité parametry. Přesněji řečeno – musí se řídit určitými principy. Těmi jsou princip humanity, nestrannosti a neutrality.³⁹⁰ Akce, které jsou v rozporu s těmito pravidly, nelze označit za „humanitární

³⁹⁰ UN GA *Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations* (n 9), SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 13-17; Humanitarian

pomoc“ ve smyslu MHP a tím pádem se na ně nevztahují ani příslušné právní normy.³⁹¹ Tedy ani ochrana a výsady, kterou MHP humanitární pomoci jako takové poskytuje.

Princip humanity odráží samotný cíl a smysl humanitární asistence – tedy pomoc civilnímu obyvatelstvu v nouzi. Humanitární pomoc musí vždy směřovat k tomuto cíli a usilovat o něj.³⁹² Musí být tedy vedena ve prospěch trpícího civilního obyvatelstva, ne s cílem dosáhnout např. ekonomického či vojenského zisku.

Princip nestrannosti je založen na zákazu diskriminace a premise, že pomoc má být poskytována dle nejvyšší potřeby. Tedy, jediným akceptovatelným faktorem při poskytování humanitární pomoci a při její distribuci je míra potřeby trpící osoby. Vážně zranění by měli dostat přednost před méně zraněnými, více hladovějící před méně hladovějícími. Ti, kteří trpí více, před těmi, kteří trpí méně. Je ovšem zakázáno činit jakékoliv rozdíly na základě rasy, barvy pleti, národnosti, pohlaví, politického smýšlení, náboženství či například příslušnosti k určité sociální skupině.³⁹³

Třetím principem je princip neutrality. U tohoto je nezbytné poznamenat, že jej ani Ženevské úmluvy, ani Dodatkové protokoly přímo nezmiňují. Dle některých názorů jej ovšem lze vyčíst tzv. mezi řádky³⁹⁴ a zmiňuje jej např. rezoluce Valného shromáždění OSN č. 46/182 (1991) či charta Lékařů bez hranic³⁹⁵. Zároveň se jedná o jeden z hlavních principů Mezinárodního výboru Červeného kříže.³⁹⁶ Dle MacKintoshové se tento princip skládá ze dvou hlavních elementů – ideologické neutrality a neúčasti na probíhajících bojích.³⁹⁷ Ideologická neutralita neznamená, že by jednotliví poskytovatelé humanitární

Negotiations with Armed Groups. *OCHA*. January 2006, p. 25.

<<https://docs.unocha.org/sites/dms/Documents/HumanitarianNegotiationswArmedGroupsManual.pdf>> accessed 20 June 2016.

³⁹¹ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p. 1513.

³⁹² *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 817-818.

³⁹³ *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 854.

³⁹⁴ Humanitarian Principles and Humanitarian Assistance. *GSDRC*. (n 41).

³⁹⁵ The Charter. *Doctor Without Borders*. <<http://www.doctorswithoutborders.org/about-us/history-principles/charter>> 21 June 2016.

³⁹⁶ The Fundamental Principles of the Red Cross: A Commentary: Impartiality. *ICRC*. (n 194).

³⁹⁷ MACKINTOSH, Kate. *The Principles of Humanitarian Action in International Humanitarian Law* (n 34) p 6.

pomoci nemohli mít politické názory týkající se samotného konfliktu, neměli by je však vyjadřovat nahlas a vynášet soudy týkající se důvodu vzniku konfliktu či například „viny“ té či oné strany. Druhým elementem je pak nezapojování se do probíhajících bojů, a to ať již přímo či nepřímo. Za účast by bylo považováno například převážení zbraní patřících jedné ze stran konfliktu, skladování těchto zbraní v zařízeních poskytovatele humanitární pomoci, šíření propagandy mezi civilním obyvatelstvem či prozrazování strategický informací.³⁹⁸

Souhlas s humanitární pomocí

S problematikou udělování souhlasu k humanitární akci jsou spojeny dvě hlavní otázky – za jakých podmínek má stát či jiný relevantní subjekt povinnost souhlas udělit a či souhlas je vlastně zapotřebí. Odlišná pravidla se uplatňují pro situace vnitrostátních ozbrojených konfliktů, mezinárodních ozbrojených konfliktů a případy okupovaných území v rámci mezinárodních ozbrojených konfliktů.

Humanitární pomoc, tak jak ji obecně vnímá MHP a tato diplomová práce, je založena na principech humanity, nestrannosti, neutrality a zároveň také respektu k suverenitě daného státu. Jak již bylo uvedeno výše, humanitární pomoc je nenásilným institutem. Jeho násilné vynucování by bylo v příkrém rozporu s principy, na kterých je sám postaven. Podléhá tudíž souhlasu dotčeného státu.³⁹⁹ Na druhou stranu, státy jsou vázány svými mezinárodními závazky včetně povinnosti umožnit, za splnění daných podmínek, poskytnutí humanitární pomoci trpícímu civilnímu obyvatelstvu. Přestože tedy je možné, aby udělení souhlasu k humanitární pomoci odmítly, toto odmítnutí musí být dostatečně opodstatněné a rozhodně nesmí být svévolné.⁴⁰⁰ Odmítnutí souhlasu by tak mělo být výjimkou, zatímco jeho udělení pravidlem.⁴⁰¹

³⁹⁸ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 20-23.

³⁹⁹ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 6.

⁴⁰⁰ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 36; DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflicts* (n 234) p 227; GILLARD, Emanuela-Chiara. *The Law Regulation Cross Border Relief Operation* (n 128) p 6.

⁴⁰¹ CLAPHAM, Andrew; GAETA Paola and SASSÓLI, Marco. *The 1949 Conventions: A Commentary*. (n 144) p 320.

Důležitou a poměrně komplikovanou otázkou je identita subjektu, jehož souhlas je k poskytování humanitární pomoci nezbytný. Zatímco pravidla týkající se mezinárodních ozbrojených konfliktů jsou v tomto případě jasná a na jejich výkladu panuje shoda – souhlas uděluji dotčené státy, v případě vnitrostátních ozbrojených konfliktů je situace složitější. Zde totiž vyvstává otázka, zda je zapotřebí i souhlas nestátních aktérů zapojených do konfliktu – tedy například ozbrojených opozičních skupin. Příslušné smluvní ustanovení, článek 18 Dodatkového protokolu II., uvádí, že je vyžadován souhlas „Vysokých smluvních stran“. Komentář k Dodatkovému protokolu II i řada odborníků se shodují, že pod toto označení mohou spadat jen státy – jakožto signatáři protokolu, nikoliv nestátní aktéři.⁴⁰² Tento výklad by tedy naznačoval, že se výše uvedený čl. 18 na nestátní aktéry nevztahuje. Na druhou stranu, existuje výrazně podporovaný názor, že ozbrojené opoziční skupiny jsou vázány normami mezinárodního humanitárního práva, a to téměř ve stejném rozsahu jako stát, na jehož území působí.⁴⁰³ Jejich subjektivita je *sui generis* a má funkční povahu, tedy odvíjí se od faktické role, kterou tyto skupiny v ozbrojeném konfliktu sehrávají.⁴⁰⁴ Na základě tohoto přístupu by tedy bylo možné argumentovat, že souhlas samotného státu k povolení humanitární akce ve vnitrostátním konfliktu nestačí. Zároveň je zapotřebí vzít v potaz reálnou aplikaci výše uvedeného, neboť je zřejmé, že v reálné situaci je pro poskytovatele humanitární pomoci souhlas nestátních aktérů nepostradatelný – z bezpečnostního i logistického hlediska by bylo vysoce riskantní snažit se humanitární pomoc poskytovat bez něj.⁴⁰⁵

Přístup k humanitární pomoci a její distribuce

Přístup k humanitární pomoci zůstává nadále velkou výzvou, a to i v případech, když strany konfliktu daly k jejímu poskytování formální souhlas. Panuje obecná shoda,

⁴⁰² Gillard (12), *Commentary on the Additional Protocols of 8 June 1997 to the Geneva Conventions of 12 August 1949* (n 127) p 4423; FLECK, Dieter (ed.). *The Handbook of International Humanitarian Law*. Oxford: OUP, 2013, p 236; KALSHOVEN, Frits and ZEGVELD, Liesbet. *Constraints on the Waging of War – An Introduction to Humanitarian Law*. Cambridge: CUP, 2001, p. 139.

⁴⁰³ ONDŘEJ, Jan; ŠTURMA, Pavel; BÍLKOVÁ, Veronika; JÍLEK, David and collective. *Mezinárodní humanitární právo* (n 30) p 72

⁴⁰⁴ Ibid.

⁴⁰⁵ GILLARD, Emanuela-Chiara. The Law Regulation Cross Border Relief Operation (n 128) p 17.; Report of Secretary General on Children and Armed Conflicts. UN Doc S/2002/1299. 26 November 2002, para 17.

že s povinností umožnit humanitární akci je spojena zároveň i povinnost umožnit rychlé a nerušené provedení takovéto akce.⁴⁰⁶ Samotným udělením souhlasu role státu (či nestátních aktérů) nekončí, neboť výše uvedená povinnost nespočívá pouze v pasivním konání (tedy nerušení), ale i aktivním konání – strany konfliktu jsou povinny se aktivně přičinit o to, aby humanitární pomoc nerušeně a rychle dorazila ke svým příjemcům.⁴⁰⁷ Na druhou stranu, pro vyvážení této povinnosti, MHP dává stranám konfliktu omezené právo kontroly nad distribucí i transportem humanitární pomoci. A to jak po technické stránce – určení cest a časového rozvrhu, tak i faktické – právo provádět prohlídky k potvrzení, že obsah např. humanitárního konvoje opravdu obsahuje pouze předměty mající humanitární povahu (např. potraviny, léky, ošacení, apod.).

Na tomto místě by bylo vhodné upozornit, že čl. 18 Dodatkového protokolu II povinnost umožnit rychlé a nerušené poskytnutí a distribuci humanitární pomoci výslovně neobsahuje. Dle některých názorů je nicméně možné jej odvodit ze smyslu daného článku.⁴⁰⁸ Jiné se shodují na tom, že lze tuto povinnost vyvodit mezinárodního obyčejového práva.⁴⁰⁹

Povinnosti třetích států

Co se týče povinností třetích států, obecně lze shrnout, že jak na smluvní, tak na obyčejové úrovni mezinárodní humanitární právo ukládá třetím státům povinnost umožnit rychlý a nerušený transport humanitární pomoci skrz jejich území. Jedinou výjimkou, co se týče smluvního zakotvení této povinnosti, jsou situace vnitrostátních konfliktů, neboť jak společný článek 3 Ženevských úmluv, tak článek 18 Dodatkového protokolu II tuto povinnost výslovně nezmiňují. Na úrovni obyčejového práva nicméně k jejímu vytvoření došlo.⁴¹⁰ Obecně lze konstatovat, že práva a povinnosti třetích států

⁴⁰⁶ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

⁴⁰⁷ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 37.

⁴⁰⁸ SANDVIK-NYLUND, Monika. *Caught in Conflicts* (n 4) p 38.

⁴⁰⁹ YNGAERT, Cedric. Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective (n 252); Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

⁴¹⁰ Customary International Law. Database. Rule 55. *International Committee of the Red Cross* (n 85).

jsou tak téměř identická s právy státu cílového. Hlavní výjimkou tvoří oblast distribuce, ke které v tomto případě nedochází.

Ochrana humanitárních pracovníků

Bezpečnost osob a zařízení poskytujících humanitární pomoc je jednou z hlavních komplikací, s kterými se poskytovatelé humanitární pomoci i státy samotné potýkají. Obzvláště v posledních dvou desetiletích došlo k markantnímu nárůstu útoků na humanitární konvoje, pracovníky i zařízení.⁴¹¹ V tomto případě je nutné podotknout, že mezinárodní humanitární právo poskytuje všem výše uvedeným subjektům i objektům vysokou míru ochrany, a to jak na smluvní, tak na obyčejové úrovni.⁴¹² Problémem v tomto případě není nedostatečně nastavený právní rámec, nýbrž nedostatek respektu zainteresovaných aktérů vůči němu.

⁴¹¹ Annual Report 2013. *OCHA*. 2014, p 3. <<http://www.unocha.org/node/68394>> accessed 21 June 2016.

⁴¹² Civilians protected under international humanitarian law. *ICRC*. 29 October 2010. <<https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm>> accessed 21 June 2016; Customary International Law. Database. Rule 31. *International Committee of the Red Cross* (n 83).

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Abstract (Czech)

Diplomová práce se věnuje problematice humanitární pomoci v rámci mezinárodního humanitárního práva. Téma práce bylo vybráno s ohledem na jeho aktuálnost a také na základě osobního a dlouhodobého zájmu autorky.

Práce se zaměřuje na právní prameny, z kterých koncept humanitární pomoci vychází. Dále se věnuje samotné historii humanitární pomoci a jejímu modernímu vývoji a principům, na kterých je založena. Samostatná kapitola je věnována taktéž otázce poskytovatelů a příjemců humanitární pomoci. Speciální pozornost je dána problematice souhlasu s poskytováním humanitární pomoci a tomu, zda je takovýto souhlas vyžadován a od koho. Velká část práce se soustředí taktéž na poskytování humanitární pomoci, její distribuci a povinnosti třetích států.

První kapitola práce je věnována úvodu, definici samotného pojmu „humanitární pomoci“, vymezení cílů práce, hlavních otázek a také způsobů a zdrojů, na základě kterých bude práce zpracována.

Druhá kapitola podrobně rozebírá jednotlivé právní prameny, s kterými bude práce pracovat. Nejprve se zaměřuje na smluvní právo - tedy především na příslušná ustanovení Ženevské úmluvy IV., Dodatkového protokol I a Dodatkového protokolu II. Pozornost je věnována taktéž Haagským úmluvám z roku 1899 a 1907 a Římskému statutu Mezinárodního trestního soudu. Následně pojednává o právu obyčejovém – zde se zaměřuje hlavně na Studii obyčejového mezinárodního humanitárního práva vypracovanou Mezinárodním Výborem Červeného kříže.

Třetí kapitola práce krátce představuje historii a vývoj humanitární pomoci. Začíná krátkým přiblížením období starověku a středověku a následně se věnuje dění v 19. a 20. století. Především pak vyzdvihuje následky iniciativy Henryho Dunanta po bitvě u Solferina a také zásadní změny, které přineslo přijetí Čtvrté ženevské úmluvy v roce 1949.

Čtvrtá kapitola práce se zaměřuje na podmínky, které je nezbytné splnit k tomu, aby mohla být příslušná pravidla mezinárodního humanitárního práva upravující humanitární pomoc aplikována na konkrétní situaci – situaci mezinárodního konfliktu, neposkytnutí dostatečné humanitární pomoci primárním aktérem a stav, ve kterém se nachází civilní obyvatelstvo.

Pátá kapitola rozebírá poskytovatele a příjemce humanitární pomoci. Věnuje se jejich konkrétnímu vymezení a v případě poskytovatelů uvádí i pozitivní a negativní aspekty jejich zapojení.

Šestá kapitola pojednává o povaze humanitární pomoci a jednotlivých principech, na základě kterých je tento institut založen. Přibližuje také význam a aplikaci principů humanity, nestrannosti a neutrality.

Sedmá kapitola práce je věnována problematice souhlasu. Klade si otázku, kdy a za jakých podmínek je udělení souhlasu zapotřebí, kdy je možné jeho udělení odepřít a kým má být udělen.

Předposlední, kapitola se dopodrobna zabývá otázkou poskytování a distribuce humanitární pomoci – jejímu materiálnímu vymezení, povinnosti států a nestátních aktérů umožnit přístup k humanitární pomoci a její distribuci. Zároveň rozebírá povinnosti třetích států v souvislosti s poskytováním humanitární pomoci.

Poslední, devátá, kapitola je věnována závěru.

Abstract (English)

The thesis focuses on the issue of humanitarian assistance under international humanitarian law. The topic was chosen based on the personal interest of the author of the thesis and also based on the fact that it is a current and very discussed issue.

The thesis is concerned with the legal sources governing the concept of humanitarian assistance. It also focuses on the history of the concept paying special attention to its modern development and to the principles on which it is based. Individual chapter is dedicated to the issue of providers and beneficiaries of humanitarian assistance. Special attention is also given to the issue of consent with the facilitation of humanitarian assistance, whether it is necessary to sought such a consent and from whom. Significant part of the thesis focuses on the facilitation and distribution of humanitarian assistance and the obligations of the third states.

The first chapter of the thesis is dedicated to the introduction, definition of the term “humanitarian assistance”, aims and goals of the thesis, and also to the methods and sources.

The second chapter focuses in a great detail on legal sources relevant to the thesis. First, it pays attention to the treaty law. Thus, it describes the relevant provisions of the Geneva Convention IV, the Additional Protocol I, and the Additional Protocol II. It discusses also The Hague Conventions 1899 and 1907, and Rome Statute of the International Criminal Court. Secondly, it deals with the customary law paying special attention to the ICRC Customary Study on International Humanitarian Law.

The third chapter of the thesis briefly introduce the history and development of humanitarian assistance. It goes back to the ancient and medieval times and then focuses on the development in the 19th and 20th century. It highlights especially the consequences of Henry Dunant’s initiative and also the major changes caused by the adoption of the Geneva Convention IV.

The fourth chapter is interested in the conditions which it is necessary to fulfil in order for the relevant provision governing humanitarian assistance to be applicable on a particular case: a situation of armed conflict, inability of the primary actor to provide the assistance by itself, and certain level of suffering of the civilian population.

The fifth chapter deals with the providers and beneficiaries of humanitarian assistance. It focuses on their identity and definition. Regarding the providers, it is interested also in the pros and cons of their involvement.

The sixth chapter focuses on the character of humanitarian assistance and also on the principles on which the concept is based. Thus, it discusses the relevance and the application of the principles of humanity, impartiality, and neutrality.

The seventh chapter examines the issue of consent. It poses the question when and from whom it should be sought, and when it is possible to deny it.

The eighth chapter focuses in a great detail on the issue of facilitation and distribution of humanitarian assistance: its material scope, the obligations of state and non-state actors, and the obligations of the third states.

The last chapter is dedicated to the conclusion.

Key Words

Armed Conflicts, Geneva Conventions, Humanitarian Assistance, International Humanitarian Law

Klíčová slova

Ozbrojené konflikty, Ženevská úmluva, humanitární pomoc, mezinárodní humanitární právo